IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A)**
v.	)	
	)	
Senior Airman (E-4)	)	No. ACM _____
MATTHEW B. ERICSON	)	
United States Air Force	)	31 July 2023
Appellant	)	

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

On 31 March 2023, at Altus Air Force Base, OK, military members sitting at a special court-martial convicted Senior Airman (SrA) Ericson, contrary to his plea, of one charge, one specification, of intentionally accessing a government computer with an unauthorized purpose, in violation of Article 123, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 923.[1] Record of Trial (ROT), Vol. 1, *Entry of Judgment*, dated 24 April 2023. Members sentenced SrA Ericson to 1 month of hard labor without confinement. *Id.*

On 1 June 2023, the Government sent SrA Ericson the required notice by mail of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A) (2022), SrA Ericson files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

[1] Members acquitted SrA Ericson of various charges and specifications.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 July 2023.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23045**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Matthew B. ERICSON	)	**DOCKETING**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 31 July 2023. On 28 August 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

Accordingly, it is by the court on this 29th day of August, 2023,

ORDERED:

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

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	20 October 2023

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **27 December 2023**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

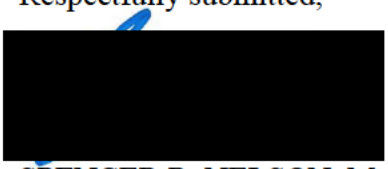
[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 20 October 2023.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 January 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time

is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

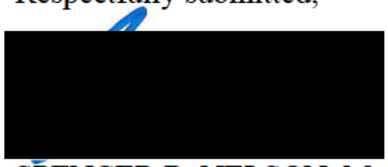
Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 15 December 2023.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

19 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

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

[redacted]

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	19 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 February 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time

is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

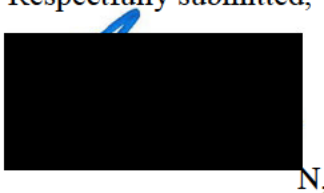
Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 19 January 2024.

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

19 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	15 February 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 fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 March 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Appellate counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Counsel has one pending Supreme Court Reply Brief (Answer due to Court and Counsel on 20 February 2024) and four pending CAAF Petitions and Supplements. Through no

fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Ten Air Force Court cases have priority over the present case:

1. *United States v. Ellis*, No. ACM 40430[1] – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.[2] R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id*.; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is not confined. Except for sealed materials, Counsel has reviewed the entire record. Counsel filed a motion to view sealed materials contemporaneously with this request for an EOT. Barring unforeseen circumstances, Counsel intends to file this AOE on 1 March 2024.

[1] On 29 January 2024, this Court (Panel 1) approved Appellant's request for EOT 9. Without prior notice and without any status conferences, this Court said, "Given the nature of the case and the number of enlargements granted thus far, the court is not willing to grant any further enlargements of time absent exceptional circumstances." As such, Counsel has changed the prioritization of this guilty plea case over the two cases docketed before this case.

[2] Various charges and specifications were withdrawn and dismissed with prejudice.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits.

The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

4. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not started his review of this case.

5. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three

volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

6. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

7. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense

exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

8. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

9. *United States v. Caswell*, No. ACM 23035 - On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, UCMJ, 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and

denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023. The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of the case.

10. *United States v. Mejia*, No. ACM 40497 - On 8 March 2023, pursuant to his pleas and plea agreement, a military judge in a general court-martial at Osan Air Base, Republic of Korea, convicted Appellant of one charge with three specifications of possessing, viewing, and distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934; and, of the same charge, two specifications of communicating indecent language in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 106. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be discharged dishonorably. R. at 208. The Convening Authority took no action on the findings, but took the following action on the sentence: deferral of the reduction in grade until the signing of the entry of judgment and waiver of automatic forfeitures for six months. *Convening Authority Decision on Action*. The Record of Trial consists of three volumes, 13 prosecution exhibits, 13 defense exhibits, and five appellate exhibits. Appellant is confined. Counsel has not yet started his review of this case.

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

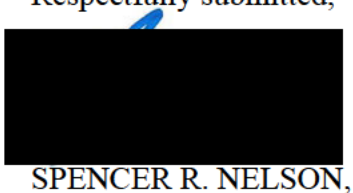
Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 15 February 2024.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

26 February 2024

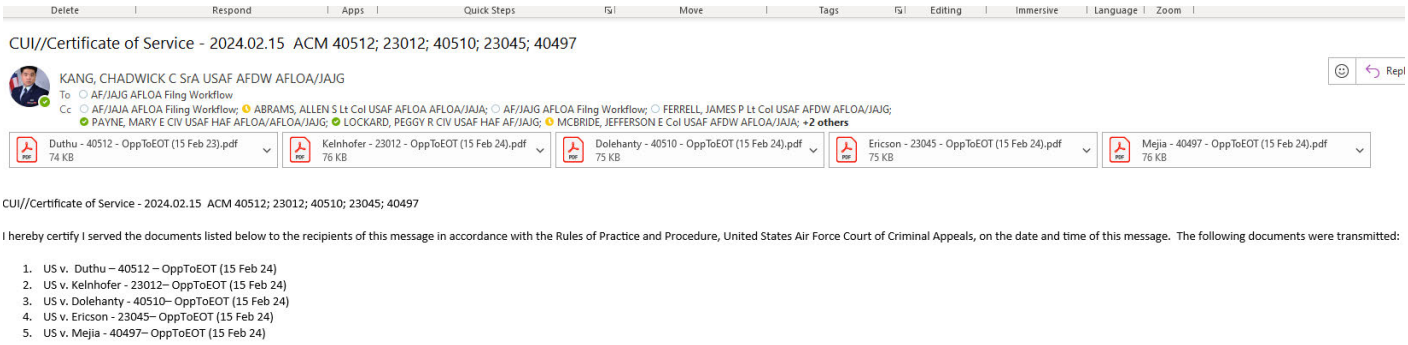
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

Pursuant to Rule 23.3 (m)(7) of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition, out of time, to Appellant's Motion for Enlargement of Time Out of Time to file an Assignment of Error in this case.

This response is being filed out of time because the United States accidentally served the wrong workflow box when filing the EOTs on 15 February 2024:



The error did not come to the United States' attention until the motions were granted without opposition. The United States understands that this Court has already granted an enlargement of time in this case, but would still like to put its opposition to that enlargement of time on the record.

WHEREFORE, the United States respectfully enters its opposition to Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE COURT OF CRIMINAL APPEALS
1500 WEST PERIMETER ROAD, SUITE 1900
JOINT BASE ANDREWS MD 20762-6604

29 February 2024

MEMORANDUM FOR HQ USAF/JAJG
ATTENTION: MS. PAYNE, ESQ.

FROM: HQ USAF/JAH

SUBJECT: *United States v. Kelnhofer*, No. ACM 23012
United States v. Ericson, No. ACM 23045
United States v. Mejia, No. ACM 40497
United States v. Dolehanty, No. ACM 40510
United States v. Duthu, No. ACM 40512

1. On 26 February 2024, this court received five filings to the subject cases from the Government titled "United States' General Opposition to Appellant's Motion for Enlargement of Time." However, the court is returning these filings because they are not properly filed in accordance with the Joint Rules of Appellate Procedure and this court's Rules of Practice and Procedure, for the reasons outlined below.

2. Counsel for each of the five Appellants submitted a Motion for Enlargement of Time (EOT) to the court requesting an additional 30 days to submit Appellants' assignments of error. After two business days pursuant to Rule 23.2 of this court's Rules of Practice and Procedure, and no opposition by the Government, the court granted Appellants' motions on 22 and 23 February 2024.* A.F. CT. CRIM. APP. R. 23.2. The Government then served the five filings, dated 26 February 2024, on the court to explain that "th[eir] response is being filed out of time because the United States accidentally served the wrong workflow box" when filing their general oppositions in response to the five EOT motions, and "would still like to put its opposition to th[ose] enlargements of time on the record." The Government further stated that it "understands that this [c]ourt has already granted an enlargement of time in [each] case." Such filings are not authorized by this court.

3. Rule 23(d) of the Joint Rules of Appellate Procedure state that "[a]ny pleading not authorized or required by these or Service Court rules shall be accompanied by a motion for leave to file such pleading. A motion for leave to file the pleading and the pleading may be combined in the same document." JT. CT. CRIM. APP. R. APP. 23(d). Rule 31.2 of this court's Rules of Practice and Procedure provide guidance regarding motions for reconsideration. A.F. CT. CRIM. APP. R. 31.2.

4. Further, the court notes that all five filings by the Government incorrectly refer to the Appellants' motions as "Motion[s] for Enlargement of Time Out of Time," when our records show that their motions were not filed out of time.

* The court granted the *Dolehanty* motion for an enlargement of time on 22 February 2024, while all other motions were granted by the court on 23 February 2024.

5. Therefore, for the reasons stated above and pursuant to A.F. CT. CRIM. APP. R. 13.4, the Government's five filings to the subject cases, titled "United States' General Opposition to Appellant's Motion for Enlargement of Time," and dated 26 February 2024, are returned with no action.

[redacted]

CAROL K. JOYCE
Clerk of the Court
U.S. Air Force Court of Criminal Appeals

5 March 2024

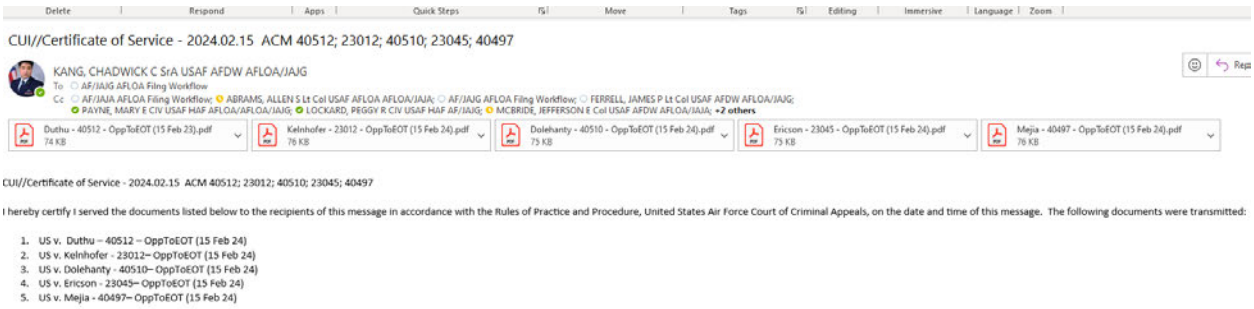
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	))))))))))	MOTION FOR LEAVE TO FILE UNITED STATES' OUT OF TIME GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

Pursuant to Rules 23(d), 23.2 and 23.3(m)(7), of this Court's Rules of Practice and Procedure, the United States hereby enters its Motion for Leave to File and the United States' Out of Time General Opposition to Appellant's 15 February 2024 Motion for Enlargement of Time to file an Assignment of Error in this case.

This response is being filed out of time because the United States accidentally served the wrong workflow box when filing the EOT opposition on 15 February 2024.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CUI//Certificate of Service - 2024.02.15 ACM 40512; 23012; 40510; 23045; 40497

KANG, CHADWICK C SrA USAF AFDW AFLOA/JAJG

To: AF/JAJG AFLOA Filing Workflow

Cc: AF/JAJA AFLOA Filing Workflow; ABRAMS, ALLEN S Lt Col USAF AFLOA AFLOA/JAJA; AF/JAJG AFLOA Filing Workflow; FERRELL, JAMES P Lt Col USAF AFDW AFLOA/JAJG; PAYNE, MARY E CIV USAF HAF AFLOA/AFLOA/JAJG; LOCKARD, PEGGY R CIV USAF HAF AF/JAJG; MCBRIDE, JEFFERSON E Col USAF AFDW AFLOA/JAJA; +2 others

Duthu - 40512 - OppToEOT (15 Feb 23).pdf 74 KB | Kelnhofer - 23012 - OppToEOT (15 Feb 24).pdf 76 KB | Dolehanty - 40510 - OppToEOT (15 Feb 24).pdf 75 KB | Ericson - 23045 - OppToEOT (15 Feb 24).pdf 75 KB | Mejia - 40497 - OppToEOT (15 Feb 24).pdf 76 KB

CUI//Certificate of Service - 2024.02.15 ACM 40512; 23012; 40510; 23045; 40497

I hereby certify I served the documents listed below to the recipients of this message in accordance with the Rules of Practice and Procedure, United States Air Force Court of Criminal Appeals, on the date and time of this message. The following documents were transmitted:

1. US v. Duthu – 40512 – OppToEOT (15 Feb 24)
2. US v. Kelnhofer - 23012– OppToEOT (15 Feb 24)
3. US v. Dolehanty - 40510– OppToEOT (15 Feb 24)
4. US v. Ericson - 23045– OppToEOT (15 Feb 24)
5. US v. Mejia - 40497– OppToEOT (15 Feb 24)

The error did not come to the United States attention until the motions were granted without opposition. The United States understands that this Court has already granted an enlargement of time in this case, but would still like to put its general opposition to that enlargement of time on the

record. The United States filed an out of time opposition to this motion on 26 February 2024, however, that opposition was returned without action because it was not styled as a "motion for leave to file." The United States has now styled the opposition as a "motion for leave to file."

WHEREFORE, the United States respectfully requests this Court grant its motion for leave to file an out of time opposition.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 March 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	15 March 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 fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 April 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Appellate counsel is currently assigned 22 cases; 11 cases are pending initial AOEs before this Court. Counsel has two pending CAAF Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review

of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Nine Air Force Court cases have priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has reviewed all unsealed exhibits and has started to review the transcript.

2. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency

submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

3. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is not confined. Counsel has not started his review of this case.

4. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT),

Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

5. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

6. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense

exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

7. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

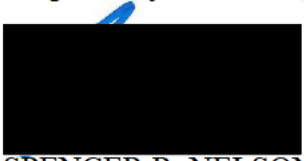
8. *United States v. Caswell*, No. ACM 23035 - On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, UCMJ, 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and

denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023. The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of the case.

9. *United States v. Mejia*, No. ACM 40497 - On 8 March 2023, pursuant to his pleas and plea agreement, a military judge in a general court-martial at Osan Air Base, Republic of Korea, convicted Appellant of one charge with three specifications of possessing, viewing, and distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934; and, of the same charge, two specifications of communicating indecent language in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 106. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be discharged dishonorably. R. at 208. The Convening Authority took no action on the findings, but took the following action on the sentence: deferral of the reduction in grade until the signing of the entry of judgment and waiver of automatic forfeitures for six months. *Convening Authority Decision on Action*. The Record of Trial consists of three volumes, 13 prosecution exhibits, 13 defense exhibits, and five appellate exhibits. Appellant is confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

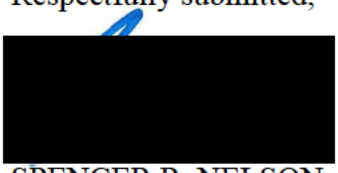


SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

19 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew B. ERICSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Sixth) 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 17th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Sixth) is **GRANTED**. Appellant shall file any assignments of error not later than **25 May 2024**.

Appellant's counsel should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits. Appellant's counsel is advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted *absent exceptional circumstances*.

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 provided an update of the status of counsel's progress on Appellant's case*, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	15 April 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 sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 May 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Appellate counsel is currently assigned 21 cases; 10 cases are pending initial AOEs before this Court. Counsel has two pending CAAF Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review

of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Nine Air Force Court cases have priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has reviewed the entire record except for sealed materials and the last 300 pages of the 1448-page transcript.

2. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening

Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

3. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is not confined. Counsel has not started his review of this case.

4. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority

took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

5. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

6. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action,

dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

7. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

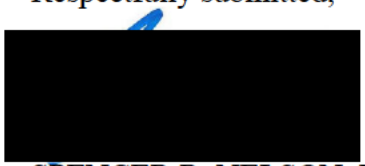
8. *United States v. Caswell*, No. ACM 23035 - On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, UCMJ, 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R.

at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023. The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of the case.

9. *United States v. Mejia*, No. ACM 40497 - On 8 March 2023, pursuant to his pleas and plea agreement, a military judge in a general court-martial at Osan Air Base, Republic of Korea, convicted Appellant of one charge with three specifications of possessing, viewing, and distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934; and, of the same charge, two specifications of communicating indecent language in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 106. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be discharged dishonorably. R. at 208. The Convening Authority took no action on the findings, but took the following action on the sentence: deferral of the reduction in grade until the signing of the entry of judgment and waiver of automatic forfeitures for six months. *Convening Authority Decision on Action*. The Record of Trial consists of three volumes, 13 prosecution exhibits, 13 defense exhibits, and five appellate exhibits. Appellant is confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



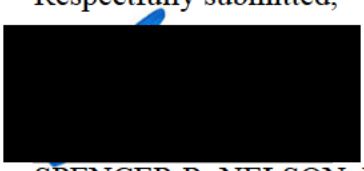
SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division

United States Air Force
(240) 612-4773

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 April 2024.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
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(240) 612-4773

16 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 April 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **MATTHEW B. ERICSON** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION TO ATTACH DOCUMENT** Before Panel 2 No. ACM 23045 18 April 2024

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

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

A. Appendix – Special Court Martial Verbatim Transcript – United States v. Senior Airman Matthew B. Ericson

On 31 July 2023, Appellant filed his notice of appeal pursuant to Article 66(b)(1)(A), UCMJ. On 8 August 2023, the Government requested the preparation of a verbatim transcript from JAT. On 29 August 2023, the above captioned appeal was docketed with this Court. On 17 April 2024, the Government received the original and two copies of the verbatim transcript.

The appendix contains the verbatim transcript, and the Government requests that the transcript be attached to the Record of Trial. The verbatim transcript is necessary for a complete review on direct appeal. The verbatim transcript was hand delivered to the Court and Appellate Defense Counsel on the date of this filing.

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian appellate defense counsel and to the Appellate Defense Division on 18 April 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew B. ERICSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 17 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

Also on 17 May 2024, Appellant's counsel filed a Motion to Attach Document, specifically a declaration from Appellant. In the declaration, Appellant states, *inter alia*, "I understand that this [c]ourt has ordered my counsel to give me an update on my case before it will grant an extension of time, but I do not want to be updated monthly unless my appellate counsel has something substantive to discuss with me." We will rule on this motion separately.

In the motion for an extension of time, Appellant's counsel requests this court "remove the language ordering [c]ounsel to continue to contact [A]ppellant regarding extensions" that appears in this court's order granting Extension of Time (Sixth), dated 15 April 2024. That order required Appellant's counsel, in any subsequent motions for enlargement of time, to state: "(1) *whether* Appellant was advised of Appellant's right to a timely appeal, (2) *whether* Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) *whether* Appellant was advised of the request for an enlargement of time, and (4) *whether* Appellant agrees with the request for an enlargement of time." (Emphasis added). The court did not require affirmative answers as a prerequisite to granting any future requests for enlargements of time. That order also stated that "each request will be considered on its merits," which includes counsel's statements concerning the timely processing of Appellant's appeal.

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

Accordingly, it is by the court on this 23d day of May, 2024,

ORDERED:

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	17 May 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 June 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Appellate counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. Counsel has one pending CAAF Supplement due on 29 May 2024. Through no fault of

Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case.

Appellant is in receipt of this Court's order, dated 17 April 2024. *See* Motion to Attach Document, dated 17 May 2024. Appellant is aware of his right to speedy appellate review, extensions of time, consents to this extension of time, and was given an update on the prioritization of his case. *Id.* Appellant stated that he does not want to be bothered with non-substantive updates and that he trusts me—as his attorney—to requests extensions of time that are in his best interest. *Id.* Counsel requests that this Court grant this extension and, if granted, remove the language ordering Counsel to continue to contact appellant regarding extensions. In that vein, and given Counsel's workload over approximately the last year at the Supreme Court, CAAF, and this Court—including the new direct appeals that Congress enacted—Counsel notes the following:

> Appellate counsel caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government. To allow caseloads to become a factor in determining whether appellate delay is excessive *would allow administrative factors to trump the Article 66 and due process rights of appellants.* To the contrary, the Government has a statutory responsibility to establish a system of appellate review under Article 66 that preserves rather than diminishes the rights of convicted servicemembers. In connection with that responsibility, **the Government has a statutory duty under Article 70 to provide Petitioner with appellate defense counsel who is able to represent him in both a competent and timely manner before the Court of Criminal Appeals**.

Diaz v. JAG of the Navy, 59 M.J. 34, 38 (C.A.A.F. 2003) (emphases added) (footnote omitted).

Eight Air Force Court cases have priority over the present case:

1. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced

Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is not confined. Counsel has reviewed the entire record, drafted a four-issue AOE, and is finalizing edits on the AOE. Counsel will be filing the AOE on or before the current deadline of 26 May 2024.

2. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is not confined. Counsel has reviewed the entire record of trial except for sealed materials. On 16 May 2024, Counsel moved this Court to examine sealed materials. It is likely, although not certain, that Counsel will file this AOE on or before the deadline of 30 May 2024.

3. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted

Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

4. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

5. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one

specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

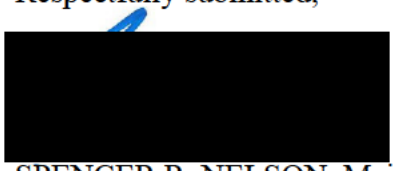
6. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

7. *United States v. Caswell*, No. ACM 23035 - On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, UCMJ, 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023. The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of the case.

8. *United States v. Mejia*, No. ACM 40497 - On 8 March 2023, pursuant to his pleas and plea agreement, a military judge in a general court-martial at Osan Air Base, Republic of Korea, convicted Appellant of one charge with three specifications of possessing, viewing, and distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934; and, of the same charge, two specifications of communicating indecent language in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 106. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be discharged dishonorably. R. at 208. The Convening Authority took no action on the findings, but took the following action on the sentence: deferral of the reduction in grade until the signing of the entry of judgment and waiver of automatic forfeitures for six months. *Convening Authority Decision on Action*. The Record of Trial consists of three volumes, 13 prosecution exhibits, 13 defense exhibits, and five appellate exhibits. Appellant is confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

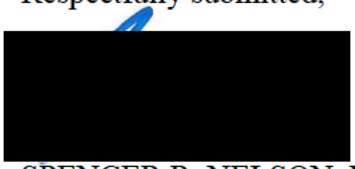


SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 May 2024.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

20 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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 started review of the record of trial at this late stage of the appellate process.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 May 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew B. ERICSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 17 May 2024, counsel for Appellant filed a Motion to Attach Document, specifically a declaration from Appellant. Counsel avers that the "declaration is relevant and necessary to answer the questions this [c]ourt posed in an [o]rder granting an extension of time." Counsel refers to this court's order on Appellant's motion for enlargement of time (sixth), dated 17 April 2024, which required counsel to state, inter alia, "*whether Appellant was provided an update of the status of counsel's progress on Appellant's case*." In the motion and declaration, Appellant's counsel and Appellant respectively state Appellant asked that his declaration be attached to the record of trial. The Government did not file an opposition.

The court accepts but does not endorse counsel's assertion that Appellant's declaration was relevant and necessary for counsel to request an extension of time to file Appellant's brief with this court.

Accordingly, it is by the court on this 30th day of May, 2024,

ORDERED:

Appellant's Motion to Attach Document is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	17 May 2024

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Matthew B. Ericson, the Appellant, hereby moves to attach the following document to the record of trial: a one-page declaration of Appellant, dated 16 May 2024. This Declaration is contained in the Appendix to this motion. This declaration is relevant and necessary to answer the questions this Court posed in an Order granting an extension of time. *See* Order, Panel 2, dated 17 April 2024.

This Court may attach this declaration to the record. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding service Courts of Criminal Appeals may consider affidavits "when doing so is necessary for resolving issues raised by materials in the record"); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). Appellant's claims were raised in the record—an Order from this Court. Because this Court asked direct questions that affected the attorney-client relationship, Appellant chose to respond to this Court. Because the Appellant's declaration is responsive to this Court's questions, this Court may consider and attach Appellant's declaration. Appellant also asked that his

declaration be attached to the record.

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

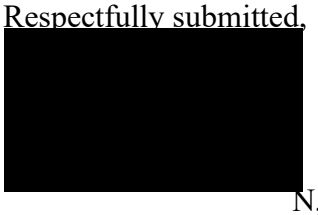
Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773
spencer.nelson.1@us.af.mil

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 Division on 17 May 2024.

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
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(240) 612-4773

APPENDIX

DECLARATION

I, Matthew B. Ericson, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. On 31 March 2023, contrary to my plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted me of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ. The members sentenced me to hard labor without confinement for one month. The Convening Authority took no action on the findings or sentence. I am not confined and I'm still on active duty in the United States Air Force.

2. I have read this Court's order dated 17 April 2024 and Major Nelson, my appellate defense counsel, has explained it to me. In response to this Court's order, I am providing this affidavit in support of my request for an extension of time and I would like to have it attached to my record of trial.

3. First, my appellate defense counsel has explained my right to speedy appellate review. I understand that I have a due process right to speedy appellate review and that this generally means an appellate court will apply a presumption of unreasonable delay where a decision is not rendered within 18 months of the government docketing my case. However, I also understand that if my case is not completed within 18 months it does not guarantee me any relief. Rather, the presumption of unreasonable delay only triggers a balancing test that an appellate court will use to determine if there was a violation of my speedy appellate rights.

4. Barring egregious Government misconduct, I understand that I am not likely to get relief for a speedy appellate review delay.

5. Second, my appellate defense counsel has explained to me what a request for an enlargement of time is and has given me an update on where my case is in his prioritization. I understand that my appellate defense counsel prioritizes his cases by the date the Government docketed them with this Court. I consent not only to this current enlargement of time, but to all enlargements of time that he deems are in my best interest so he can fully review my case.

6. I understand that this Court has ordered my counsel to give me an update on my case before it will grant an extension of time, but I do not want to be updated monthly unless my appellate counsel has something substantive to discuss with me. I have my counsel's contact information and I know I can call him at any time to discuss my case and its status. My appellate defense counsel represents me on this appeal and I trust his professional judgment to ask for extensions of time based on the conversations and input I have given him about my case.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 16th day of May 2024

[redacted]

MATTHEW B. ERICSON

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	14 June 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 July 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial Consists of four volumes, four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Appellate counsel is currently assigned 20 cases; five cases are pending initial AOEs before this Court. Counsel has two CAAF Grant Briefs, with a total of five issues that require briefing per CAAF's order. Through no fault of Appellant, undersigned counsel has been working on other

assigned matters and has not yet started his review of Appellant's case. Appellant has provided limited consent to disclose confidential communications with counsel which only include the following: That Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Counsel is in compliance with his ethical obligations as it relates to communications with his client.

Four Air Force Court cases have priority over the present case:

1. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has reviewed the entire case except for sealed materials. On 14 June 2024, the Government answered this Court's Show Cause Order and provided the password to the sealed materials. The Government moved to attach the password to the record and this Court has not yet ruled on that motion.

2. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115,

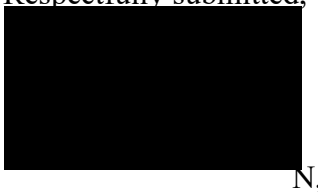
UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has started an initial review of the case.

3. *United States v. Caswell*, No. ACM 23035 - On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, UCMJ, 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023. The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of the case.

4. *United States v. Mejia*, No. ACM 40497 - On 8 March 2023, pursuant to his pleas and plea agreement, a military judge in a general court-martial at Osan Air Base, Republic of Korea, convicted Appellant of one charge with three specifications of possessing, viewing, and distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934; and, of the same charge, two specifications of communicating indecent language in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 106. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be discharged dishonorably. R. at 208. The Convening Authority took no action on the findings, but took the following action on the sentence: deferral of the reduction in grade until the signing of the entry of judgment and waiver of automatic forfeitures for six months. *Convening Authority Decision on Action*. The Record of Trial consists of three volumes, 13 prosecution exhibits, 13 defense exhibits, and five appellate exhibits. Appellant is confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
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(240) 612-4773

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 14 June 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

17 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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 started review of the record of trial at this late stage of the appellate process.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 June 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew B. ERICSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 June 2024, counsel for Appellant submitted a Motion to Examine and Transmit Sealed Materials. Specifically, counsel seek to examine Appellate Exhibit XIV, but one of Appellant's two counsel, Major Nicole Herbers, "is unable to view these materials in-person."

The Government does not oppose the motion with regards to the viewing of the sealed material as long as its counsel may also examine the same sealed materials as necessary to respond to any assignments of error referencing those materials. The Government did not specifically respond to the Defense request to transmit the materials.

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* (2024 ed.).

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 28th day of June, 2024,

ORDERED:

Appellant's Motion to Examine and Transmit Sealed Materials to Appellant's military defense counsel is **GRANTED**.

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibit XIV**, subject to the following instructions: To view the sealed materials, counsel will coordinate with the court. Except as specified below, no counsel will photocopy, photograph, or otherwise reproduce the

sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Appellant's request to create and transmit a copy of the requested sealed exhibit to Major Herbers is **GRANTED.** Appellant's counsel is permitted to scan a hardcopy of the requested sealed material; transfer a scanned copy of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided by Major Herbers, and transmit files containing sealed materials encrypted or password-protected to Major Herbers via DoD SAFE. Appellant's military counsel must label any DVD copies with Appellant's name, ACM number, the date, and the language "CUI – sealed materials under R.C.M. 1113" and place it in a sealed envelope containing the same identifying information. Appellant's military counsel is also permitted to send sealed materials to Major Herbers via U.S. mail, Federal Express, or by similar secure means of shipment.

It is further ordered:

If counsel possess any copies of **Appellate Exhibit XIV** as a result of this order, counsel are authorized to retain such copies until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate counsel shall destroy any retained copies in their possession.

FOR THE COURT

[redacted], Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO EXAMINE AND TRANSMIT SEALED MATERIALS**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	27 June 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3) and Rules 3.1, 23.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to examine sealed material in Appellant's record of trial, Appellate Exhibit XIV. This exhibit was presented and reviewed at trial by all parties. R. at 75, 78. This Air Force Office of Special Investigation regulation was sealed by the military judge due to its controlled nature. R. at 75.

Pursuant to R.C.M. 1113(b)(3)(B)(i), "materials presented or reviewed at trial and sealed…may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]" A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on review and analysis of the entire record. Therefore, a review of the entire record, including this exhibit that was considered when the military judge denied the trial defense's motion to suppress statements, is necessary for the undersigned counsel and co-counsel to fulfill their obligation to review 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.*

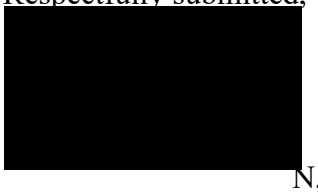
> *Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). The sealed material must be reviewed in order to provide "competent appellate representation." *Id.* Therefore, the examination of this exhibit is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his or her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870 without first reviewing the complete record of trial.

Additionally, given this material is not contraband, undersigned counsel requests, pursuant to Rule 23.3(f)(3) that a copy of such an exhibit is transmitted, via secure means as determined by this Court, to Major Nicole Herbers, who was recently assigned as co-counsel, but who is unable to view these materials in-person. Undersigned counsel proposes DOD SAFE as a transmission method unless this Court prefers or allows a different means, such as email. Maj Herbers will be taking over as sole counsel, and transmission of the exhibit will ensure this appeal can be processed expediently. Undersigned counsel is likely to request withdrawal from this case, after consultation with Appellant, because of his upcoming PCA.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the motion to examine and provide written authorization to transmit the sealed materials to Maj Herbers in a manner set by this Court.

Respectfully submitted,



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nicole.herbers@us.af.mil

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 Division on 27 June 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 23045 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Materials. The United States does not object to Appellant's counsel reviewing the named exhibit, so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

WHEREFORE, the United States respectfully responds to Appellant's motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 June 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MATTHEW B. ERICSON,** United States Air Force, *Appellant.*	)	No. ACM 23045
	)	15 July 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 ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 August 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 31 March 2023, contrary to his plea, military members in a special court-martial at Altus Air Force Base, Oklahoma, convicted Appellant of one charge, one specification of unauthorized access of a government computer, in violation of Article 123, UCMJ, 10. U.S.C. § 923. R. at 271. The members sentenced Appellant to hard labor without confinement for one month. R. at 301. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*. The Record of Trial consists of four volumes, and the verbatim transcript is 859 pages, in excess of the four-volume record. There are four prosecution exhibits, nine defense exhibits, and 31 appellate exhibits. Appellant is not confined.

Undersigned counsel is currently assigned 10 cases; seven cases are pending initial AOEs before this Court. Since appearing on behalf of Appellant on 27 June 2024, Counsel completed

review of the transcript, viewed the sealed materials, and began review of the remaining record of trial. Additionally, undersigned counsel has briefed two of the pending AOEs before this Court, expecting to file *United States v. Caswell* (on EOT 10) on 16 July 2024 and *United States v. Tozer* (on EOT 1). Counsel also will file a Reply Brief before CAAF on 15 July 2024 for *United States v. Vanzant*.

Maj Nelson, who is assistant counsel for the case, is currently assigned 18 cases; two cases are pending initial AOEs before this Court. Counsel has one pending CAAF Grant Brief that is due on 22 July. Through no fault of Appellant, assistant counsel has been working on other assigned matters and has not started his review of Appellant's case. That is, Counsel's caseload has prevented him from starting Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. One Air Force Court case has priority over the present case: *United States v. Scott*, ACM No. 40369. Counsel has reviewed the entire record and is approximately half way through the transcript of proceedings. Since his last extension of time, counsel has:

1. Drafted a four-issue, 38-page (current page count), CAAF Grant Brief in *United States v. Casillas*, No. 24-0089/AF, 2024 CAAF LEXIS 329 (C.A.A.F. June 14, 2024). Counsel is continuing his work on this Brief

2. Drafted a one-issue, 37-page CAAF Grant Brief and compiled a 148-page Joint Appendix in *United States v. Saul*, No. 24-0098/AF, 2024 CAAF LEXIS 308 (C.A.A.F. June 6, 2024)

3. Reviewed the Government's Answer, drafted and filed a one-issue, four-page Reply in *United States v. Serjak*, No. ACM 40392

4. Reviewed the Government's Answer, drafted, and filed a one issue, four-page Reply in *United States v. Van Velson*, No. ACM 40401

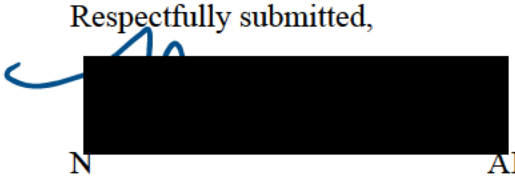
5. Filed a Merits Brief with one *Grostefon* issue in *United States v. Block*, No. ACM 40466

6. Filed a Merits Brief with one *Grostefon* issue in *United States v. Block*, No. ACM 40466

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet finished her review of Appellant's case. Assistant counsel has advised Appellant of his right to a timely appeal and Appellant consented to request for enlargements of time. Appellant has been provided an update on the undersigned counsel's progress, and Appellant has been advised on the request for this enlargement of time. Appellant's case is counsel's priority, and no further extensions of time are anticipated based on the facts known to counsel at this time. Granting this extension of time is necessary for the undersigned counsel to fully review the record, consult with Appellant, and for Appellant to make an informed decision about the matters to be raised.

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

Respectfully submitted,



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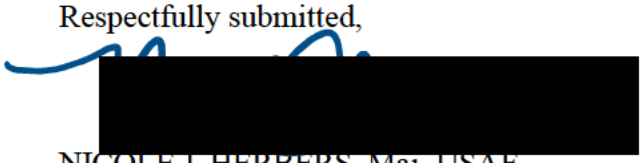
Email: nicole.herbers@us.af.mil

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 July 2024.

Respectfully submitted,



NICOLE J. HERBERS, Maj, USAF
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17 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MATTHEW B. ERICSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23045 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 321 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 July 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (SrA) **MATTHEW B. ERICSON** United States Air Force *Appellant*	)	No. ACM 23045 23 August 2024

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

Assignments of Error[1]

I.

WHETHER THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT MUST BE MODIFIED TO ACCURATELY REFLECT THE DISPOSITION OF ALL REFERRED CHARGES.

II.

WHETHER THE CONVICTION OF THE SPECIFICATION OF CHARGE III IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE WIRE INTERCEPT AUDIO WHEN LAW ENFORCEMENT OBTAINED THE RECORDING IN VIOLATION OF THE GOVERNING REGULATION.

[1] Undersigned counsel notes there are errors within the record of trial. Appellate Exhibit XII is listed as 23 pages in the index, although the exhibit has 24 pages. Exhibit Index, ROT Vol. 2. Appellate Exhibit XXI is incorrectly marked as exhibit XI, although correctly placed and identified in the record and index. SrA Ericson asserts no prejudice from these errors, although this is indicative of the Government's continued gross indifference to post-trial processing. *See United States v. Valentin-Andino*, No. ACM 40185 (f rev) 2024 CCA LEXIS 223 *17 (A.F. Ct. Crim. App. 7 June 2024) (unpub. op.).

Statement of the Case

At a special court-martial at Altus Air Force Base, Oklahoma, between 27 March 2023 and 31 March 2023, a panel of officer and enlisted members convicted Appellant, Senior Airman (SrA) Matthew B. Ericson, contrary to his pleas, of one specification of wrongful use of a government computer in violation of Article 123, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 923.[2] R. at 757. The panel sentenced SrA Ericson to thirty days of hard labor without confinement. R. at 857. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 18 April 2023. On 1 June 2023, SrA Ericson was notified of his right to submit a direct appeal. Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals, 1 June 2023. On 29 August 2023, this Court docketed SrA Ericson's case, after receiving his notice of direct appeal on 31 July 2023. *United States v. Ericson*, No. ACM 23045, Notice of Docketing, 29 August 2023.

Statement of Facts

Post-Trial Paperwork

SrA Ericson originally had seven specifications of domestic violence referred to court-martial. *See* Department of Defense Form 458, *Charge Sheet* (May 2000) (DD Form 458). Specification 7 was withdrawn and dismissed post-referral, on 22 March 2023. *Id*. There is no finding as to the referred specification 7 of Charge I on either the Entry of Judgment (EOJ) or Statement of Trial Results (STR). EOJ; STR.

Upon the trial defense motion for appropriate relief for unreasonable multiplication of charges, the Government agreed to merge specifications 4 and 5 of Charge I for findings and

[2] All references to the punitive articles are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*); all other references to the UCMJ and references to the Rules for Courts-Martial (R.C.M.) are to the 2023 *MCM* version.

sentencing. R. at 20-21; *see also* App. Ex. VIII. Without opposition to the trial defense's motion, the military judge granted the merger of specifications 4 and 5 prior to entry of pleas. R. at 22. The flyer was updated to include only five specifications under Charge I. App. Ex. XVIII. Specification 4 of Charge I in the flyer read, in part: ". . . commit a violent offense against C.L., his intimate partner, by unlawfully grabbing her by the shoulders with his hands and pushing her into a refrigerator *and raising his leg to kick her*." *Id.* The italicized words were those words merged from specification 5. No changes were made on the charge sheet for either specification 4 or 5. DD Form 458. The EOJ and STR both show SrA Ericson entered a plea of not guilty for specifications 4 and 5 and detail the language of specification 4 of Charge I as follows: ". . . commit a violent offense against C.L., his intimate partner, by unlawfully grabbing her by the shoulders with his hands and pushing her into a refrigerator" (amended after arraignment to add the words "and raising his leg to kick her"). SrA Ericson never entered pleas to specification 5 as it was merged prior to entry of pleas, during motions practice. R. at 22.

Charge III and its Specification

Out of five charges with eleven specifications total, SrA Ericson was only convicted of one charge and specification of wrongful use of a government computer. R. at 757. SrA Ericson was charged with unauthorized use of a government computer between on or about 1 March 2020 and on or about 21 April 2022. DD Form 458. The alleged misuse had to do with SrA Ericson using the Oklahoma Law Enforcement Telecommunication System (OLETS) to look up information about C.L. prior to their first date and to get C.L. a base pass. R. at 308, 309, 311, 706. SrA Ericson had lawful access to OLETS through a government computer due to his duties as a Base Defense Operations Center (BDOC) controller. R. at 538, 603, 628; Pros. Ex. 4 at 3-4. As a BDOC controller, SrA Ericson had access to OLETS from 2 October 2019 through 2 October

2021. R. at 625, 628. The alleged misuse to look up C.L.'s information preceded their first date in October 2019, approximately five months before the charged timeframe. R. at 308, 311; DD Form 458.

On a wire intercept, SrA Ericson admitted he ran C.L.'s information through OLETS. R. at 575. On the recording, he also admitted he did not think it was wrong, because he was training members of Security Forces on OLETS. R. at 576. The Government offered no testimony that use of C.L.'s information for training was wrong. SrA Ericson had C.L.'s information only because she sent it for a pass, and he ran it before she got there so the pass was ready when she arrived. *Id.* The Government only put forth SrA Ericson's statements he ran her information, R. at 575-76, and the testimony of C.L., that SrA Ericson admitted to her that he ran her information. R. at 311.

A.M., SrA Ericson's former commander, testified OLETS was used only for specific purposes, like investigations, traffic stops, or things of that nature. R. at 622. M.C., who worked in Security Forces Reports and Analysis, testified to use OLETS you had to both have access and have specific identifying information of a person in order to look up that person's law enforcement records. R. at 630.

The Government argued SrA Ericson was guilty of Charge III and its specification based on the testimony of C.L.: "[T]owards the beginning of their relationship [in 2019], he told her that he looked her up. He ran a background check on her to make sure that she wasn't involved in any crimes." R. at 721.

Argument

I.

THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT MUST BE MODIFIED TO ACCURATELY REFLECT THE DISPOSITION OF ALL REFERRED CHARGES.

Standard of Review

Appellate courts perform *de novo* review of post-trial processing. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). Interpretation of a Rules for Courts-Martial (R.C.M.) provision is also a question of law that is reviewed *de novo*. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted).

Law and Analysis

R.C.M. 1101(a)(1)(B)-(C) provides that an STR shall consist of findings for each charge and specification *referred* to trial, including both the pleas of the accused and the finding or other disposition of each charge and specification. (emphasis added).

R.C.M. 1111(b)(1)(B)-(C) has analogous requirements for the EOJ, it must contain pleas and findings for each charge and specification *referred* to trial. (emphasis added).

Both the EOJ and STR contain findings only on arraigned offenses, and thereby failing to comport with the above-mentioned rules by omitting one referred specification. *See* EOJ, STR. SrA Ericson had seven specifications of assault consummated by a battery amounting to domestic abuse referred to trial, and findings on only six of the referred specifications. *Compare* DD Form 458, *with* STR and EOJ. Neither the EOJ nor STR account for the withdrawal and dismissal of specification 7 of Charge I, which was referred to trial.

The errors in the STR and EOJ were not limited to omitting a referred specification, but

also extended to a failure to address the post-arraignment changes to specifications 4 and 5 of Charge I. The entry of pleas for specification 5 is incorrect in the STR and EOJ. *Compare* STR and EOJ, *with* R. at 21-22 (where the military judge granted the motion to merge specifications 4 and 5 for findings prior to entry of pleas). SrA Ericson did not enter a plea on specification 5, but rather pled not guilty to the merged specification consisting of the acts listed in specification 4 and 5. R. at 21-22, 105.

It is error here for the Government to narrow the scope of both the STR and the EOJ to contain findings only on arraigned offenses. The plain language of the Rules for Courts-Martial requires pleas and findings for all referred offenses in both the STR and EOJ. *See* R.C.M. 1101(a)(1)(B)-(C); R.C.M. 1111(b)(1)(B)-(C). Moreover, the entry of pleas on specification 5 is inaccurately reflected on both the STR and EOJ given the specification was merged prior to entry of pleas. R. at 21-22, 105.

This Court "may act only with respect to the findings . . . as entered into the record." Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A). However, the finding or other disposition of the referred specification 7 is not entered into the record and must be corrected for this Court to complete their review. R.C.M. 1101(a)(1)(B)-(C), R.C.M. 1111(b)(1)(B)-(C). This Court should correct these deficiencies to accurately reflect the disposition and pleas of all referred charges in the STR and EOJ.

WHEREFORE, SrA Ericson respectfully requests this Honorable Court correct the STR and EOJ to accurately reflect the findings and pleas on all referred charges and specifications.

II.

THE CONVICTION OF THE SPECIFICATION OF CHARGE III IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, . . . the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* (alteration in original) (citations and internal quotations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id.* (alteration in original) (citation omitted).

"The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," [this] court is "convinced of the [appellant]'s guilt beyond a reasonable doubt."" *United States v. Reed*, 54 M.J.

37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting a factual sufficiency review, this Court takes "a fresh impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [an] independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quoting *Washington*, 57 M.J. at 399).

To sustain a conviction for wrongful use of a government computer, the Government was required to prove that SrA Ericson intentionally accessed a government computer, with an unauthorized purpose, and thereby obtained other protected information from any such government computer. DD Form 458; 2019 *MCM* pt. IV, para. 69.a.(2). With respect to an unauthorized purpose, "[t]he key criterion to determine criminality is whether the person intentionally used the computer for a purpose that was clearly contrary to the interests or intent of the authorizing party." 2019 *MCM*, pt. IV, para. 69.c.(2).

The Government sculpted a narrow window into which it could prove those elements, with a charged timeframe that barely overlapped with the period in which SrA Ericson had access to the computer system at issue, OLETS. While charged with wrongful use of a government computer between on or about 1 March 2020 and on or about 21 April 2022, DD Form 458, SrA Ericson only had access to OLETS between 2 October 2019 and 2 October 2021. R. at 625, 628. Therefore, to be guilty of this offense, evidence must have established between on or about 1 March 2020 and 2 October 2021, when SrA Ericson had access to OLETS, he used a government computer to look up C.L.'s law enforcement record for an unauthorized purpose.

There are three distinct times SrA Ericson is alleged to have accessed C.L.'s information on a government computer without authorization. First, he is alleged to have used a government

computer to look up C.L.'s information prior to their first date. R. at 308, 311. Second, by his own admission, he used a government computer to access OLETS to run C.L's information for a base pass. R. at 576. Third, he used a government computer to access C.L.'s information in OLETS for training. R. at 576. When these three instances are evaluated, the evidence from the timeframe SrA Ericson had access to OLETS is insufficient to sustain a conviction because during the charged timeframe he had an authorized purpose, and there is no evidence he actually accessed OLETS using C.L.'s information for an unauthorized purpose within the charged timeframe.

The first time SrA Ericson is alleged to have used a government computer without authorization, in October 2019, is outside the charged timeframe. The use of the phrase "on or about" in the charged timeframe does not help the Government meet its burden because the possible timeframe indicated by the evidence is too large to be considered "on or about" the charged dates. The Court of Appeals for the Armed Forces (CAAF) has previously indicated this pleading language includes dates which are "reasonably near" the charged dates and "connotes a range of days to weeks." *United States v.* Simmons, 82 M.J. 134, 139 (C.A.A.F. 2022) (quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)). Thus, the court has found this language encompasses differences of two or three days, seven days, and three weeks. *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001); *United States v. Brown*, 34 M.J. 105, 106, 110 (C.M.A. 1992), *overruled in part on other grounds*; *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017); *Hunt*, 34 M.J. at 347. Consistent with factual sufficiency application in *Simmons*, a variance of five months to October 2019, "far exceeds any permissible variance" in previous case law and is not "reasonably near" to the charged timeframe of March 2020. *Simmons*, 82 M.J. at 138, 140. While *Simmons* dealt with a variance of 279 days, and here it is a range of 150 days, 150 days is still nowhere close to a difference of two days, three days, seven days, or three weeks. A range of

150 days exceeds any permissible variance established in case law. *Id.* Thus, this testimony from C.L. that SrA Ericson looked her up when they were first dating in October 2019 cannot support the conviction within this charged timeframe of March 2020 through April 2022. The only evidence the Government had from C.L. to support this conviction then is SrA Ericson used her information to get a base pass close to March 2020. *See* R. at 309, 311.

Beyond the strained relationship between the charged timeframe and the conduct at issue, the proof was deficient because SrA Ericson, as a BDOC controller, was lawfully able to access OLETS for the other two times he used a government computer to access C.L.'s information. In exercising his authorized use of a government computer to access OLETS, SrA Ericson looked up C.L.'s information to get her a base pass. R. at 309, 311, 576. As a BDOC controller, use of a government computer to act on a pending request for base access cannot support the conviction for wrongful use of a government computer given the authorized purpose. *See* Pros. Ex. 4 (detailing SrA Ericson's work as a BDOC controller, which included force protection and traffic programs); *see also* R. at 622 (A.M.'s testimony regarding authorized use of OLETS included traffic management); *see also* R. at 576 (SrA Ericson's statement he ran C.L.'s information through OLETS to get her access to base). SrA Ericson, in looking up C.L.'s information to get her access to base is not "clearly contrary" to the authorized use of a government computer. *Compare* 2019 *MCM*, pt. IV, para. 69.c.(2) (where an unauthorized use of a government computer has to be "clearly contrary" to interest or intent of the authorizing party), *with* R. at 311, 576 (C.L. gave SrA Ericson her information to get a base pass), *and also with* R. at 622 (where OLETS was used for traffic management).

Not only was the use of OLETS by SrA Ericson to obtain C.L. a base pass consistent with his authorized access, so, too was his purpose of doing so for training. SrA Ericson's admission

he accessed C.L.'s information through OLETS is not an instance of him taking advantage of OLETS and a government computer for personal benefit. R. at 575-76. Rather, SrA Ericson used the access he had and his responsibility as a trainer and BDOC controller to use her request for a pass as a training opportunity. R. at 576. SrA Ericson only had C.L.'s information because she sent it for a pass, and he ran it before she got there so the pass was ready when she arrived. *Id.* This evidence from SrA Ericson similarly is not enough to sustain the conviction because it also shows SrA Ericson's authorized use of OLETS – to get C.L. a base pass, R. at 622, and for training members of his flight. R. at 576. This is consistent with the duties and responsibilities listed for SrA Ericson as a BDOC controller during this period. *See, e.g.*, Pros. Ex. 4 at 3 (where SrA Ericson was identified as a trainer and a BDOC controller).

The evidence admitted at trial proves that SrA Ericson admitted to an authorized use of C.L's information in OLETS for training and for carrying out his duties as a BDOC controller. A rational trier of fact could not have found the essential elements of an unauthorized use of a government computer beyond a reasonable doubt. There was no evidence presented to contradict SrA Ericson's assertion of the authorized use of OLETS and the other instance of alleged misuse transpired months prior to the charged timeframe. Even viewing the evidence in the light most favorable to the Government, there is no evidence within the charged timeframe that SrA Ericson ever accessed a government computer for an unauthorized purpose. The evidence is insufficient to sustain a conviction.

Based on a fresh, impartial look at the evidence, including the testimony from C.L., the admissions of SrA Ericson, and the charged timeframe, this evidence does not establish proof of each required element beyond a reasonable doubt. *Wheeler*, 76 M.J. at 568. Based on the evidence admitted, there is no proof beyond a reasonable doubt that SrA Ericson accessed OLETS on a

government computer for an unauthorized purpose as defined by statute within the charged timeframe. As such, the conviction is both legally and factually insufficient for the reasons outlined above.

WHEREFORE, SrA Ericson requests this Honorable Court set aside the finding of guilty for the specification and Charge III and the sentence.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE WIRE INTERCEPT AUDIO WHEN LAW ENFORCEMENT OBTAINED THE RECORDING IN VIOLATION OF THE GOVERNING REGULATION.

Additional Facts

Over trial defense counsel objection, the Government admitted wire intercept audio from 21 April 2022 of SrA Ericson discussing the domestic violence allegations and the allegation of wrongful use of a government computer. Pros. Ex. 1; App. Ex. XI. The Air Force Office of Special Investigations (AFOSI) had to get consent and approval to carry out the wire intercept, in accordance with the governing manual. *See generally*, App. Ex. XIV at 11-13, R. at 27-28. The AFOSI Form 52 is used to coordinate approval for all wire intercepts. App. Ex. XIV at 11. On the AFOSI Form 52 there is a signature, date, and name block for the approval authority. App. Ex. XI at 21. The approval authority did not sign the AFOSI Form 52 until after the intercept was completed. *Id.* The Government put forth evidence there was verbal approval from the commander. App. Ex. XII at 5. That same evidence, a Microsoft Teams™ message, stated the approval authority had not accessed either his email or messages. *Id.*

In admitting this evidence, the military judge made findings of fact. App. Ex. XVI. On 19 April 2022, a special agent requested permission from the Commander of the AFOSI's 4th Field Investigations Region to intercept a conversation between the witness and SrA Ericson. *Id.*

at 2. The request was required by and was made on the AFOSI Form 52. *Id.* The intercept occurred on 21 April 2022 at approximately 1800 hours. *Id.* The AFOSI 4th Field Investigations Region Commander signed the AFOSI Form 52 on 22 April 2022. *Id*. at 3.

Additionally, the military judge, in setting forth the law, identified the provision of the manual that required use of the form for all requests, and that the approval authority must ensure all provisions of the manual are complied with before approving the intercept. *Id.* at 4. The military judge reasoned that because the manual did not specifically state a formal signature had to be placed on the AFOSI Form 52 prior to the intercept, a verbal approval prior to the intercept was permitted. *Id.* The military judge admitted the wire intercept, finding no violation of the governing regulation. *Id.*

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013).

Construction of regulations is a question of law, which is reviewed *de novo*. *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).

Law and Analysis

Evidence obtained by members of the Armed Forces or their agents through interception of wire or oral communications for law enforcement purposes is not admissible unless such intercept is authorized under the regulations issued by the Secretary of Defense or the Secretary concerned. Mil. R. Evid. 317(c)(3). AFOSI Manual 71-103, Vol. 3, *Technical Operations* (8 April 2019) governs AFOSI wire or oral intercepts. App. Ex. XIV.

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles

were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

The test for admissibility of evidence under Mil. R. Evid. 317(c)(3) is one of exclusion; evidence obtained from intercepts is inadmissible unless authorized. Mil. R. Evid. 317(c)(3). In analyzing the admission of such evidence, the military judge found that AFOSI Manual 71-103, Vol. 3, para 4.1.1. required the use of the AFOSI Form 52 to request consensual oral, wire, or electronic intercepts. App. Ex. XVI at 6. The military judge also found the approval authority must ensure all provisions of the manual were complied with before approving the intercept request. *Id.* Despite finding that the AFOSI Form 52 must be used to process these requests, the military judge found the failure to get a signature on the AFOSI Form 52 prior to the intercept did not render the intercept inadmissible. *Id.* at 7. The military judge, in reviewing the manual, could not find a provision requiring a written authorization prior to the intercept, and therefore found a verbal approval would suffice. *Id.*

In analyzing this evidence, the military judge's interpretation of the regulation applied an incorrect legal principle – one of statutory construction, thus there is an abuse of discretion in the admission of this evidence. *Ellis*, 68 M.J. at 344. Specifically, the military judge's determination that there was no violation of the regulation because the manual did not prohibit oral approval of the intercept is not supported the general rules of statutory construction.

In interpreting regulations, the general rules of statutory construction apply. *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007). "It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning." *United States v. Mooney*, 77 M.J. 252, 255 (C.A.A.F. 2018) (quoting *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005)). This is

known as the "ordinary meaning" canon. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). Unless the plain reading of the text is absurd, courts are to enforce statutes according to their terms. *Id.* (citations and quotations omitted). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Here, AFOSI Manual 71-103, Vol. 3, para 4.1.1. requires the use of the AFOSI Form 52 for all intercepts. App. Ex. XIV at 11. The AFOSI Form 52 only contemplates written authorization as there is no mechanism within the form or the regulation to grant verbal approval. *See* App. Ex. XI at 20-26, *see also* App. Ex. XIV (AFOSI Manual 71-103). The regulation is not ambiguous. The regulation plainly states the AFOSI Form 52 must be used and both the regulation and the form itself does not provide for verbal approval. App. Ex. XIV at 11. When the military judge presumed a verbal authorization was permitted, that was in contravention to the plain meaning of the regulation.

Should the Court find the plain meaning of the regulation does not reject verbal authorization, the omitted-case canon similarly shows the military judge abused his discretion. When the military judge found verbal approval was authorized based on what the manual *did not* say, that also violated the omitted-case canon of statutory construction. With the omitted-case canon, nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004). A matter not covered – verbal approval – is to be treated as omitted intentionally. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). Thus, the exclusion of verbal approval within the regulation operates to exclude such an authorization. *Lamie*, 540 U.S. at 538. The manual states that wire intercepts are only approved when the AFOSI Form 52 is used. *See* App. Ex. XIV at 11, *see also* App. Ex. XI at 20-26. The AFOSI Form 52 requires written authorization.

App. Ex. XI at 20-26. Therefore, the written authorization was required prior to any wire intercept. Stated differently, the approval must be documented on the Form 52 prior to the intercept because the form itself is required for all intercepts and the form only contemplates written authorization. *See* App Ex. XIV at 11; *see also* App. Ex. XI at 20-26.

The military judge's application of the facts to find the wire intercept was done in accordance with the manual was also clearly unreasonable. While the special agent, not the commander, relayed a verbal approval from the Commander, the Commander who approved this operation had also not checked his messages or his email. App. Ex. XII at 5. Therefore, the military judge's finding of fact that the agent complied with the regulation, including the provision that approval authority must ensure all provisions of the manual were complied with before approving the intercept request, conflicts with the actual facts of this case. *Compare* App. Ex. XVI at 6 (the finding the agent complied with the regulation), *with* App Ex. XII at 5 (where the approval authority had not reviewed his email or messages [thus why he did not sign the AFOSI Form 52 but granted verbal approval]). The approval authority, in not reviewing his email or message to sign the AFOSI Form 52, calls into question whether the approval authority ensured all aspects of the regulation were complied with as each step is documented within the AFOSI Form 52. *See* App. Ex. XI at 20-26. There record is silent on whether the approval authority, in not viewing the AFOSI Form 52 to sign because he had not checked his email or messages, ensured all requirements were met prior to "verbal approval." When the military judge concluded the authorization was valid, it was not supported by his application of the facts. Because of the erroneous interpretation of the regulation and because of the errant application of the facts to the finding the approval was valid, the military judge's decision to admit this evidence was an abuse of discretion.

In finding the military judge abused his discretion, the analysis turns to whether SrA Ericson was prejudiced by the admission of this evidence. "For nonconstitutional evidentiary errors, the test for prejudice "is whether the error had a substantial influence on the findings."' *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017). "In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2), the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Kohlbek*, 78 M.J. at 334 (citations omitted) (internal quotation marks omitted).

Analyzing the factors under *Kohlbek*, prejudice is established. As outlined in Issue II, above, the SrA Ericson's own statements from the wire intercept were the crux of the Government's case that SrA Ericson accessed a government computer without authorization. Of the three times SrA Ericson is alleged to have accessed C.L.'s information on a government computer, one is outside the charged timeframe as outlined above. *See* page 9, *supra*. For the remaining occurrences, the strength of the Government's case was weak given the testimony of C.L. that within the charged timeframe SrA Ericson used her information for an authorized purpose – to get a base pass. R. at 309, 311. The wire intercept testimony also showed SrA Ericson ran her information for an authorized purpose. R. at 576. As to the quality of the evidence in question, SrA Ericson's admissions on the wire intercept to using OLETS on a government computer to get C.L. a base pass and for training were uncontested.

Looking to the materiality of this evidence, the evidence from the wire intercept was material to the finding of guilty given it supported C.L.'s testimony that he ran her information. *See* R. at 309, 311, *see also* R. at 576. Had this evidence from the wire intercept not been admitted, SrA Ericson likely would have been found not guilty because the only evidence the members

would have had to convict were the statements of C.L., whom the members may not have found credible based on the mixed findings. SrA Ericson was found not guilty of the charges and specifications where C.L. was the Government's only witness. *Compare* R. at 791 (a not-guilty finding for all specifications of domestic violence related to C.L. (Charge I, specifications 1, 2, 3, 4)), *with* R. at 307-352 (where C.L. was the only witness to these events). The mixed findings are consistent with the members not finding C.L.'s testimony alone enough to convict. Thus, absent the wire intercept, C.L.'s testimony would have been the only evidence they had for the specification of Charge III. Without SrA Ericson's admissions supporting C.L.'s testimony, SrA Ericson would have been found not guilty. This shows SrA Ericson's admissions on the wire intercept had a substantial influence on the findings.

Based on the relative weakness of the Government's case, the materiality of the wire intercept evidence, and the quality of the evidence, the Government cannot meet the burden to demonstrate that the admitted evidence was not prejudicial. *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014).

WHEREFORE, SrA Ericson requests this Honorable Court set aside the finding of guilty for the specification and Charge III and the sentence.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 August 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew B. ERICSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 September 2024, the Government submitted a motion to attach a post-trial declaration from Ms. Mary Ellen Payne and a Department of Defense Instruction O-5505.09, Interception of Wire, *Electronic, and Oral Communications for Law Enforcement* (27 Nov. 2013, incorporating Change 2, effective 18 May 2016). The Government avers that the declaration's attached instruction is not publicly available but serves as primary authority on applicable guidance discussed at trial. Appellant did not oppose the motion.

The court has considered the Government's motion and the applicable law. The court grants the Government's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 1st day of October 2024,

ORDERED:

The Government's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **MATTHEW B. ERICSON**, United States Air Force *Appellant.*	)))))))))	**UNITED STATES' MOTION TO ATTACH DOCUMENTS** No. ACM 23045 Before Panel No. 2 23 September 2024

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

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

- APPENDIX – Declaration of Mary Ellen Payne, dated 23 September 2024, with one attachment – DoD Instruction O-5505.09, "Interception of Wire, Electronic, and Oral Communications for Law Enforcement", November 27, 2013; Incorporating Change 2, Effective May 18, 2016. (22 pages)

Our Superior Court held that matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). Here, Appellant's Assignment of Error III raises the issue as to whether Mil. R. Evid. 317(c) requires exclusion of evidence obtained pursuant to a wire intercept where the AFOSI agents conducting the operation allegedly failed to comply with the applicable technical operating regulations. (App. Br. at 12-17.) The specific regulation discussed at trial was AFOSI Manual 71-103, Volume 3, which was included in the Record of Trial as a sealed appellate exhibit. (App. Ex. XIV.) However, Department of Defense Instruction (DoDI) O-5505.09, from which the AFOSI Manual is partially derived, was not included as a part of the

record. The DoDI is relevant to resolution of the issue, as it serves as the most primary authority on the applicable Department of Defense law enforcement technical operating procedures. Although the DoDI was not considered by the military judge, the instruction will give this Court the full background as to the pertinent law and regulations that address consensual intercepts in the Air Force.

While the United States would not ordinarily attach a matter of law, such as a regulation, to the record through a motion to attach, this document was formerly controlled as For Official Use Only-Law Enforcement Sensitive (FOUO-LES) and is still not publicly available. However, as explained in the attached declaration, the document is no longer considered controlled by the DoD and can be submitted to this Court. Additionally, the proposed attached document is the version of the instruction which was in effect at the time the operation was performed and is now obsolete. Now, the United States moves this Court to grant this motion to attach to include DoDI O-5505.09 in the record of trial.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **MATTHEW B. ERICSON**, United States Air Force *Appellant.*	)))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** No. ACM 23045 Before Panel No. 2 23 September 2024

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

ISSUES PRESENTED

I.

WHETHER THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT MUST BE MODIFIED TO ACCURATELY REFLECT THE DISPOSITION OF ALL REFERRED CHARGES.

II.

WHETHER THE CONVICTION OF THE SPECIFICIATION OF CHARGE III IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE WIRE INTERCEPT AUDIO WHEN LAW ENFORCEMENT OBTAINED THE RECORDING IN VIOLATION OF THE GOVERNING REGULATION.

STATEMENT OF THE CASE

On 27 March 2023, a special court-martial convened at Altus Air Force Base, Oklahoma. Appellant elected to be tried by a panel of officer and enlisted members and entered pleas of not guilty to twelve total specifications under Articles 128b, 92, 123, 115, and 134, Uniform Code of Military Justice (UCMJ). (R. at 105.) Contrary to his pleas, the panel found Appellant guilty of one specification of wrongful use of a government computer in violation of Article 123, UCMJ. (*Entry of Judgment*, 24 April 2023, ROT, Vol. 1.) Appellant was found not guilty of all other specifications, except one specification which was merged with another pursuant to a Defense Motion for Appropriate Relief. (Id.; R. at 21-22, 105-106.) The military judge signed the Entry of Judgment (EOJ) and Statement of Trial Results (STR) which reflected the disposition of each of the twelve specifications which were before the court. (*Entry of Judgment*, 24 April 2023, ROT, Vol. 1.) The panel sentenced Appellant to thirty days of hard labor without confinement. (Id.; R. at 857.) The convening authority took no action on the findings or sentence. (*Convening Authority Decision on Action*, 18 April 2023, ROT, Vol. 1.)

STATEMENT OF FACTS

Prior to trial on the merits, on 27 March 2023, a hearing was held under Article 39(a), UCMJ. (R. at 2-108.) Therein, the court took up administrative matters and allowed counsel to take up the remaining unresolved issues. (Id.) The convening authority's decision to withdraw and dismiss one of the Article 128(b) ("domestic violence") specifications, multiple defense motions, and objections concerning voir dire questions were among the outstanding issues. (R. at 2-108.)

Concerning the withdrawal and dismissal of specification 7 of the domestic violence charge, the military judge noted that the number of specifications on the original charge sheet

had been reduced and briefly inquired as to the circumstances. (R. at 13.) As a part of this discussion, the military judge indicated he was satisfied that the convening authority had directed the withdrawal and dismissal of this specification and asked trial counsel to annotate its respective number for the record.[1] (R. at 13.) The military judge then confirmed that trial counsel had made the appropriate modifications to the charge sheet to reflect the withdrawal and whether renumbering of the remaining specifications would be necessary. (R. at 13-14.) No rulings or orders were issued by the military judge on this matter. (R. at 14). The Charge Sheet shows that Specification 7 of Charge I was completely lined through with the notation, "withdrawn and dismissed." (*Charge Sheet*, 21 December 2022, ROT, Vol. 1 at 2.) The modification was also initialed by trial counsel and dated 22 March 2023. (Id.) Neither the flyer nor the findings worksheet received by the panel included the original specification 7 of domestic violence or any variation thereof. (App. Ex. XVIII; App. Ex. XXVI.)

Regarding additional motions practice, the court first addressed the Defense Motion for Appropriate Relief for Unreasonable Multiplication of Charges. (R. at 14-15, 20; App. Ex. V.) Specifically, Defense had asked the court to merge two of the remaining domestic violence specifications for purposes of findings and sentencing. (R. at 21). The trial counsel indicated that the Government's initial position changed and that it no longer opposed the Defense's request to merge the two specifications. (R. at 20.) Prior to this, trial counsel also clarified on the record that the convening authority had not taken any action on the specification at issue and the intent was to handle resolution of the Defense motion through motions practice. (R. at 14-15.) Based on the parties' agreement, the military judge then granted the Defense motion and

[1] The military judge had previously requested an email from the convening authority as evidence of the convening authority's intent to withdraw and dismiss the specification at issue. (R. at 10; *Convening Authority Withdrawal and Dismissal Email*, 22 March 2023.)

instructed the parties to submit a proposed merged specification for the court's consideration, either jointly or separately, and indicated that it should be correctly reflected on the flyer. (R. at 22, 73.)

Next, the military judge allowed the parties to present additional evidence and argument on the Defense motion to suppress under Mil. R. Evid. 304(d). (R. at 23-72.) Defense argued, in relevant part, that the Air Force Office of Special Investigations (AFOSI) failed to follow its own internal procedures, specifically those listed in 71-103, Volume 3, when it neglected to have the proper authority sign an AFOSI Form 52 *prior* to conducting the wire intercept. (App. Ex. XI; R. at 22-72.) In support of its motion, Defense called Special Agent KC and the consenting party to the intercept, TP, to testify about the circumstances surrounding the recorded conversation had with Appellant. (R. at 22-47.)

ARGUMENT

I.

THE EXISTING EOJ AND STR ACCURATELY REFLECT THE DISPOSITION OF ALL CHARGES WHICH WERE BEFORE THE COURT.

Standard of Review

The proper completion of post-trial processing is a question of law this Court reviews de novo. United States v. Zegarrundo, 77 M.J. 612 (A.F. Ct. Crim. App. 2018) (citing United States v. Kho, 54 M.J. 64 (C.A.A.F. 2000)).

Law and Analysis

Appellant suffered no prejudice from the alleged errors with the EOJ and STR, but the United States does not oppose modification to these documents to add the disposition of the original Specification 7 of Charge I or to reflect the absence of a plea with regard to

Specification 6 of Charge I. (App. Br. at 6.) The EOJ and STR, as written, reflect the guilty and not guilty findings concerning all charges and specifications that were before the court at the commencement of trial.

The government respectfully requests that this Court exercise its authority to modify the judgment as necessary rather than remanding the case for corrective action. See R.C.M. 1111(c)(2).[2] The record establishes the convening authority's and trial counsel's clear intent to withdraw and dismiss the seventh specification of Charge I prior to the entry of pleas which enables this Court to make related additions without the need for additional information or making any substantive changes. (*Convening Authority Withdrawal and Dismissal Email*, 22 March 2023ROT, Vol. 1.) Similarly, this Court has the information before it to make that change regarding Appellant's pleas without the need to remand for clerical corrective action. For these reasons, this Court should make any necessary modifications without remanding the case back to the trial court.

[2] Appellate courts have exercised this authority on several occasions. For example, in United States v. Welsh, No. ACM S32719 (f rev), 2023 CCA LEXIS 157 (A.F. Ct. Crim. App. Apr. 6, 2023) (unpub. op.), this Court noted that the EOJ cited an arraigned offense as "Art. 128a" rather than "Article 128" and elected to modify that EOJ instead of remanding the case. Similarly, in United States v. Stanford, No. ACM. 40327, 2024 CCA LEXIS 77 (A.F. Ct. Crim. App. Feb. 14, 2024) (unpub. op.), this Court exercised its authority under R.C.M. 1111(c)(2) and modified the EOJ, which inaccurately recorded the exceptions and substitutions that constituted the military judge's findings, rather than remanding the case.

II.

APPELLANT'S CONVICTION FOR WRONGFUL USE OF A GOVERNMENT COMPUTER IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

CL's Testimony

At trial, CL testified that she first met Appellant around October of 2019, and they began dating. (R. at 308). CL said that, "later on," she learned that Appellant had conducted a "background check" on her on a couple of occasions. (R. at 309). Appellant told CL that he ran a background check once before their first date, and then again before she came onto base for the first time. (R. at 310-311.) CL stated that the first time she came on base would have been in February or March of 2020. (R. at 309.) CL's testimony did not suggest that she knew about either background check before Appellant ran her information, nor did she indicate that she had ever requested a base pass or provided her personal information to Appellant for that purpose. (R. at 309-311.) Finally, CL did not mention that Appellant ever told her about using her information to train other airmen on OLETS at all, either before or after the fact. (R. at 309-311.)

Appellant's Recorded Statements

During his recorded conversation with TP, Appellant admitted that he conducted a search of CL using the Oklahoma Law Enforcement Telecommunication System (OLETS), and that he did so "on [his] own account." (R. at 575.) He admitted he "definitely ran [CL's] shit, but no tickets or outstanding warrants showed up. (R. at 577-78.) Appellant further admitted that he used CL's name and information again to "train" another airman on how to operate the system. (R. at 576.) Appellant stated that he didn't believe what he did was wrong and that if he

was in trouble, everyone else in the unit should be as well because it was common practice to use the system in this manner. (R. at 576.)

Other Witness Testimony

The government called Appellant's prior squadron commander, AM, at trial and elicited testimony about OLETS and its intended use. (R. at 615-623.) AM testified that OLETS is "an official use only type of system. You're not supposed to just go in it just to look someone up unless you're doing it for a specific reason, i.e., investigation, traffic stop…and things of those natures." (R. at 622.) The government also called a member from AFOSI, MC, to elicit information about OLETS and its intended uses. (R. at 623-632.) MC also testified that OLETS was to be used for official purposes only. (R. at 626.) She discussed the appropriate use which included only criminal justice investigation or for criminal justice employment. (Id.) She further explained that when a user logs into the system, a banner pops up and requires the user to acknowledge their ethical responsibilities before moving on. (Id.) MC specifically testified that it would "definitely" be improper for a person to use OLETS to look up information of an intimate partner or someone they were dating. (R. at 626-627.) She also stated that the user would know that this is improper use because that information is included in the training they receive for certification and because of the ethical disclaimer that pops up each time the user goes into the system. (R. at 626.) Finally, MC explained that you could conduct a search of a person by their name or birthdate, and the results were likely to provide the user with information associated with that person such as their social security number, addresses, phone numbers, birthdays, and "descriptive information." (R. at 629.) She opined that a user would have to input more than just a person's name in the search fields, in that running the search based on a person's name alone would result in "too many turnouts." (R. at 630.)

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

Legal and Factual Sufficiency

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witness," this Court is

"convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchik, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

Analysis

Appellant's guilty finding for "wrongful use of a government computer" is factually and legally sufficient. Charge III and its specification was specifically framed as follows:

> In that SENIOR AIRMAN MATTHEW B. ERICSON, United States Air Force, 97th Security Forces Squadron, Altus Air Force Base, Oklahoma, did at or near Altus Air Force Base, Oklahoma, between on or about 1 March 2020 and on or about 21 April 2022 intentionally access a government computer with an unauthorized purpose and thereby knowingly obtain protected information, to wit: law enforcement records of [CL], from such government computer.

(*Charge Sheet*, ROT, Vol. 1, p. 2.)

Appellant makes two arguments in support of his position, namely: (1) the evidence presented established that the first instance of Appellant's misuse of OLETS occurred in October 2019; and (2) Appellant's actions were not unlawful on the two other occasions he used OLETS to look up C.L.'s information because he was carrying out his official duties. (App. Br. at 8-11.) Both of Appellant's assertions fail.

As an initial matter, the specification was not charged as occurring on divers occasions, so the government could have met its burden by establishing that any of the occasions of unauthorized access put into evidence met the elements of the offense beyond a reasonable doubt. The government clarifies that the evidence at trial supports that Appellant accessed OLETS using CL's information on two occasions which were *squarely* within the charged timeframe; on or about March 2020 and at some point thereafter before his access was revoked in October 2021. (R. at 309, 575-76, 627.) And concerning the first alleged incident, occurring approximately October 2019, no changes were ever made to the specification which was submitted to the members and, thus, the cases cited in Appellant's brief are inapplicable. (App. Br. at 7-11.) Instead, this assignment of error is more properly reviewed as a variance claim.

Appellant's claim concerns *when* the offense occurred, not whether it occurred. (*See* App. Br. at 7–11) (arguing evidence did not align with charged timeframe.) As a result, his claim is one of variance, not factual sufficiency. *See* United States v. Rath, 27 M.J. 600, 604 (A.C.M.R. 1988) ("[A]ppellant misunderstands the legal significance of the conflict which exists between the pleading and the proof: such a conflict raises the legal issue of variance rather than one of the sufficiency of the evidence."); *see also* United States v. Burkhead, 2016 CCA LEXIS 73, *7 (A.F. Ct. Crim. App. 9 Feb. 2016) (upub. op.) (reciting variance instruction as satisfaction that an offense was committed "as a time, at a place, or in a particular manner that differs slightly from the exact time, place, or manner in the specification"); United States v. Williams, 2017 CCA LEXIS 178, at *3-4 (A. Ct. Crim. App. Mar. 21, 2017) (difference in location between pleading and proof was an issue of variance, not legal and factual sufficiency).

"A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with

the offense alleged in the charge." United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999). A variance is fatal only when (1) the variance was material and (2) it substantially prejudiced appellant. United States v. Hunt, 37 M.J. 344, 347 (C.M.A. 1993). Here, any potential variance was not material or prejudicial, and thus Appellant's claim fails.

The specific date of an offense need not be alleged unless time is an essential element of the offense. United States v. Williams, 40 M.J. 379, 382 (C.M.A 1994) (citing Ledbetter v. United States, 170 U.S. 606, 612 (1898)); *see also* United States v. Jones, 15 C.M.R. 664, 670 (U.S. A.F.B.R. 1954) ("[D]efects in allegations of time are merely formal except where time is an element of the offense.") (citing Weatherby v. United States, 150 F.2d 465, 466–67 (10th Cir. 1945)).

When an offense is alleged to occur "on or about," "the government is required to establish that the crime occurred at a date within the timeframe charged or reasonably near the charged timeframe in order to avoid a material variance." Allen, 50 M.J. at 86. A variance is material if it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." United States v. Finch, 64 M.J. 118, 121 (C.A.A.F. 2006). Here, none of these conditions are met.

A potential variance that alters the charged timeframe, without more, does not change the nature of the offense. "Minor variances, such as the location of the offense or the date upon which an offense is allegedly committed, do not necessarily change the nature of the offense and in turn are not necessarily fatal." United States v. Teffeau, 58 M.J. 62, 66 (C.A.A.F. 2003); *see also* United States v. Lovett, 59 M.J. 230, 235 (C.A.A.F. 2004).

Even if the government had made a change to the specification before findings were entered to expand the charging window, the government would disagree that the date the first

instance of the Appellant's wrongful use of a government computer occurred was not "reasonably near" the charged timeframe pursuant to United States v. Hunt, 37 M.J. at 347. No hard and fast rule exists concerning the range of time in which an offense can fall outside the government's charging window. In fact, the Court of Appeals for the Armed Forces (CAAF) has "consistently taken the position that the words 'on or about' in pleadings mean that the government is not required to prove the exact date of an offense, if a date 'reasonably near' is established." United States v. Simmons, 82 M.J. 134, 139 (C.A.A.F. 2022). In United States v. Simmons, CAAF explicitly stated, "we are not applying a crisp delineation between a period of time that falls within the ambit of the 'on our about' language and a period of time that falls outside the ambit of the 'on or about' language…we decline to impose a rigid and arbitrary time[]line that appears nowhere in the rule." 82 M.J. at 139.

In Simmons, CAAF discussed whether the government was permitted to broaden the charged timeframe in an extortion specification by 279 days in the middle of trial, after the named victim had testified and government had rested its case. Id. at 140. The crux of the Court's analysis in that case, though, was not the time difference in originally charged timeframe and the proposed change; it was whether the change at issue was "likely to [have] misle[]d the accused as to the offenses charged" under R.C.M. 603(a). Based on the "totality of the circumstances" in that case, CAAF found that the change was so material that the originally charged specification was misleading and, consequently, did not provide the appellant sufficient notice. Id. at 140. Specifically, CAAF opined that the modification to the timeline allowed the government to argue that the extortion offense at issue preceded the charged sexual assaults, effectively changing the nature and seriousness of the charged offenses. Id. at 140.

CL testified only briefly on the subject wherein she recalled having met Appellant around October 2019 and that Appellant told her that he had run her information prior to their "first date." (R. at 308-309.) While the government acknowledges the span of time between October 2019 and the beginning of the time frame on the charge sheet (approximately five months), it maintains that this amount of time is "reasonably near" the charged timeframe. Again, no bright line rule exists concerning the permissible variance of time when the government utilizes the "on or about" language. Here, the nature or seriousness of the offense remains unchanged. Moreover, the specification as drafted so that no question exists that the Accused had adequate notice of the offense with which he was charged and, thus, cannot reasonably argue that he was misled by the same. If any confusion existed on Appellant's part as to *which* incident the government was referencing in its specification because Appellant had run CL's information through OLETS on numerous occasions without an authorized purpose, he could have asked for a bill of particulars. Instead, Appellant made no assertions at trial of variance, confusion, or being misled.

Next, Appellant's claims that the other incidents where he used the system to run CL's information was in furtherance of his official duties are simply incorrect and contradicted by several witnesses. First, Appellant claims that CL provided her information to him so that he could get her a base pass and relies on this as though it were fact. (App. Br. at 11.) In reality, CL testified that Appellant told her about having used OLETS to obtain a pass for her to get on base *after he had already done so*, which shows that she had no prior knowledge and did not make the request to have her information run. (R. at 309.) During her testimony, CL indicated that she was surprised to learn Appellant had conducted a background check on her and said that, at first, she thought Appellant was joking. (R. at 309.) She did not indicate that it was discussed

with Appellant previously or that she ever requested that he personally conduct a background check on her to get her base access. (R. at 309). Similarly, CL never testified that she provided Appellant with any of her personal information to use for that purpose. (R. at 309.)

Additionally, Appellant's squadron commander, AM, testified that OLETS was to be used for "official use only" and clarified that an authorized use would be for law enforcement things such as "investigations or traffic stops." (R. at 622.) Notably, AM did not include running background checks on one's own girlfriend to determine whether they can come on base in his list of authorized uses. (R. at 622). The panel members absolutely could have relied on this testimony from Appellant's commander, arguably the person in the best position to provide what his airman was and was not authorized to do, in determining that Appellant's conduct was wrongful.

Even if that weren't enough, AFOSI personnel, MC, also testified extensively about the system wherein she explained the layers of protection utilized to ensure its proper use. (R. at 624-632.) She specifically testified that running background checks on intimate partners or love interests was "definitely" not proper use. (R. at 626.) Neither AM nor MC provided any exceptions or qualifiers to their description of authorized uses of the system. Specifically, they did not allow an exception for training other airmen on how to use the system. In fact, MC testified concerning the appropriate training to become a certified user, which was actually an online certification program that *she* was responsible for monitoring. (R. at 623-26.) MC testified that the training entailed a formal, standardized process, including fingerprinting, an "extensive training," followed by a 20-25 question test.

Appellant ignores the distinct function of the finder of fact and the light in which it must be viewed and relies on a skewed interpretation of the evidence, namely assigning undue weight

to his own statements, that this Court should decline to adopt. Appellate courts are not required to accept an appellant's view of the record of trial or the inferences which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990). But in any event, Appellant admitted that he ran CL's information through OLETS "on his [own] account" (R. at 575), and a reasonable factfinder could have inferred that Appellant meant that he ran the background check for his own purposes, and not for an official purpose. And the evidence at trial did not support that it would be appropriate or authorized to use an intimate partner's personal information for training purposes, especially without her consent.

Finally, Appellant's statement of facts quotes the Government's closing argument on the issue. (App. Br. at 4.) First, reliance by Appellant on the government's closing argument at trial in its conclusion as to what the panel did or did not consider in reaching its findings is faulty, in that it fails to consider that panel members are not limited to the arguments and analyses offered by trial counsel. Second, trial counsel did not only argue concerning the incident before Appellant's first date with CL. Rather, trial counsel simply stated, "towards the beginning of their relationship, he told her that he looked her up. He ran a background check on her to make sure that she wasn't involved in any crimes." (R. at 721.) This argument supports both incidents CL was made aware of by Appellant and testified about in the government's case-in chief. The second incident, which occurred before CL came onto base for the first time, was squarely within the government's time frame.

The government proved Appellant used OLETS to access CL's information on various occasions without her prior knowledge, and that his conduct was wrongful under the circumstances in that it exceeded the scope of his official duties and was not consistent with the intent of the authorizing party. The evidence presented by the government at trial was factually

sufficient. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court can be convinced of Appellant's guilt beyond a reasonable doubt. The evidence was also legally sufficient to show that viewing all the evidence in the light most favorable to the government, a rational factfinder could have found Appellant guilty beyond a reasonable doubt of the charged offense. The Court should find that Appellant's conviction is legally and factually sufficient, deny this assignment of error, and affirm the findings.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING THE WIRE INTERCEPT AUDIO, IN THAT IT WAS OBTAINED BY LAW ENFORCEMENT PURSUANT TO AIR FORCE AND DEPARTMENT OF DEFENSE REGULATIONS.

Additional Facts

In an Article 39(a), UCMJ, session, prior to entry of pleas). Defense argued, in relevant part, that the Air Force Office of Special Investigations (AFOSI) failed to follow its own internal procedures, specifically those listed in AFOSI Manual 71-103, Volume 3, when it neglected to have the proper authority sign AFOSI Form 52 *prior* to conducting the wire intercept. In support of its motion, Defense called TP and Special Agent (SA) KC to testify about the circumstances surrounding the recorded conversation TP had with Appellant.)In relevant part, SA KC testified that he participated in the oral intercept operation involving Appellant and TP. (R. at 27.) As a part of the operation, TP, Appellant's then-roommate, agreed to attempt to engage in conversation with Appellant concerning the charged offenses while using a recording device to capture the conversation. (R. at 27.) SA KC testified that these types of operations are done by AFOSI in efforts to obtain information during an investigation and discussed the approval

process required to conduct such a procedure. (R. at 27-28). He clarified that the process and the requirements can look different depending on whether you have one party to the conversation consenting to the recording and that in the circumstance where you have consent, the requirements are less stringent. (R. at 27-29.)

During TP's testimony, he confirmed that he agreed to participate in the operation after he first interviewed with OSI. (R. at 40-43.) He stated that the agents interviewing him brought up the idea initially, but that he agreed to participate and did so of his own volition. (Id.) He further stated that he was friends and roommates with Appellant but began to become suspicious that Appellant may have been guilty of some of the allegations against him, particularly related to the domestic abuse. (R. at 39-41, 45). During the recorded conversation with Appellant, Appellant made several admissions regarding his use of OLETS and specifically stated that he had entered CL's information into the system on two separate occasions. (R. at 575-576.)

After hearing arguments and evidence, the military judge ordered the production of AFOSI Manual 71-103, Volume 3, for the court's review. (R. at 71-72.) Once received, the manual was marked and placed under seal. (R. at 75-56; App. Ex. XIV.) After reviewing the manual and hearing additional argument from counsel, the military judge entered his findings and ruling on the issue. (Ex. XVI at 7.) Pertinent to this issue, the military judge's ruling specifically contained findings that, "[o]n 19 April 2022, SA [KC] of OSI requested permission from the commander of OSI's 4th Field Investigations Region to intercept the pretext conversations between [TP] and [Appellant]. This approval was required by an internal OSI manual, specifically AFOSI Manual 71-101, Volume 3. The request was made on an AFOSI Form 52." (App. Ex. XVI at 2.)

Based on those findings, the military judge ruled as follows:

> [P]rior to an oral intercept, the governing regulation, AFOSIMAN 71-103 requires AFOSI to request approval via an AFOSI Form 52 and requires approval by an appropriate authority. While that approval must be documented on an AFOSI Form 52, nowhere in the governing regulation does it say the formal signature must be placed on the form prior to the intercept. Pursuant to [Mil. R. Evid.] 317, an oral intercept is admissible if it is authorized under regulations by the [S]ecretary of [D]efense. A verbal authorization prior to the formal signature on the Form 52 is not prohibited by governing regulations and the agents involved did not violate those regulations by getting verbal approval and later formalizing the approval on the Form 52.

(Id. at 7.)

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. United States v. Mott, 72 M.J. 319, 329 (C.A.A.F. 2013). Issues concerning statutory construction is a question of law, which is reviewed *de novo*. United States v. McCollum, 58 M.J. 323, 340 (C.A.A.F. 2003).

Law

The Fourth Amendment guarantees servicemembers' right to "be secure in their persons, houses, papers, and effects." U.S. Const. amend. IV. It protects against unreasonable searches and seizures and requires warrants to be issued only if based upon probable cause. Id. The Fourth Amendment's protections apply when a person has a reasonable expectation of privacy, United States v. Jones, 565 U.S. 400, 406, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). "The President has incorporated the protections of the Fourth Amendment directly into the Military Rules of Evidence in [Mil. R. Evid.] 311 through [Mil. R. Evid.] 317." United States v. Hernandez, 81 M.J. 432, 438 (C.A.A.F. 2021)(citations omitted).

"In the military justice system, the admissibility of information obtained from wiretaps is governed by Mil. R. Evid. 317." United States v. Guzman, 52 M.J. 318, 320 (C.A.A.F. 2000). "The exclusionary rule in Mil. R. Evid. 317(a) applies only to interceptions of wire and oral communications that violate the Fourth Amendment or a statute applicable to servicemembers…an accused does not have a Fourth Amendment right to suppress recorded conversations with a consenting person, and there is no statutory prohibition against the interception or monitoring of such a conversation." Id.

Mil. R. Evid. 317(c) which became effective on 15 May 2013, now contains an exclusionary rule which requires adherence to applicable law enforcement regulations for admissibility.[3] Specifically, the Rule now states that, "evidence obtained by members of the Armed Forces or their agents through interception of wire or oral communications for law enforcement purposes is not admissible unless such interception…(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under applicable federal statutes." Mil. R. Evid. 317(c). The Drafter's analysis to Mil. R. Evid. 317 states that "[t]he Committee intends 317(c) to limit only in [sic] interceptions that are non[]consensual under Chapter 119 of Title 18 of the United States Code." Drafters' Analysis, Manual for Courts-Martial, United States A22-35 (2019 ed.)(MCM). Regarding the 2013 amendment to Mil. R. Evid. 317, the Drafter's analysis explicitly states, "[t]his revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility." Id.

The regulation applicable to this issue is AFOSI Manual 71-103, Volume 3, which implements Department of Defense Instruction (DoDI) 5505.09. The manual provides that

[3] Exec. Order No. 13,643, 78 Fed. Reg. 29559 (May 15, 2013)

AFOSI Form 52 must be used to request authorization for wire intercepts or oral communications to the appropriate approval authority. In instances where one party to the communication consents to the interception, the approval authority is the AFOSI commander at the regional level. (App. Ex. XIV.) The version of the DoDI effective at the time of Appellant's intercept was O-5505.09, "Interception of Wire, Electronic, and Oral Communications for Law Enforcement", November 27, 2013; Incorporating Change 2, Effective May 18, 2016. DoDI O-5505.09, Enclosure 3, para. 2.a(4) also provided that, "[e]xluding any exceptions noted elsewhere in this instruction (e.g., emergency situations, joint investigations), consensual interceptions of wire, electronic, and oral communications will be authorized in writing by the DCIO approval authority or his or her designee, after a legal sufficiency review." (*Government Motion to Attach*, dated 23 September 2024.) Enclosure 3, paragraph 2.c.(2) allows the DoD component authority to orally grant an emergency request for a consensual intercept under certain conditions, including when "evidence of significant criminal conduct is likely to be lost before a written request for a consensual intercept can be processed." DoDI O-5505.09, para. 2.d states that the DoDI "[d]oes not create any right or benefit, substantive or procedural, enforceable by law against the United States or the DoD or its officers, employees, or agents.[4]

Analysis

As an initial matter, the government emphasizes that Appellant has not raised any issues concerning the violation of his constitutional rights, nor could he properly do so. Appellant's

[4] The military judge did not consider the DoDI in his ruling, and trial defense counsel, who had the burden on this motion, did not make any attempt on the record to obtain the DoDI for the military judge's review. However, since the DoDI is referenced in the AFOSI Manual, it is relevant to the Court's review of the issue, especially since it is a matter of law. The United States will argue below that the DoDI supports the argument that the military judge did not abuse his discretion.

rights under the Fourth Amendment are not implicated concerning an intercepted conversation where one party to the conversation has provided consent. *See generally* Guzman, 52 M.J. 318. Further, no federal statute exists which would prohibit this type of procedure. That said, Appellant's only basis for challenge here would be derived from the additional requirements set forth under Mil. R. Evid. 317(c).

Appellant's complaint can only possibly fall under Mil. R. Evid. 317(c)(3), which references applicable regulations issued by the Secretary of Defense or the Secretary concerned. The applicable regulations here are AFOSI Manual 71-103 and DoDI O-5505.09.
But the Drafter's analysis to Mil. R. Evid. 317 states that "[t]he Committee intends 317(c) to limit only in [sic] interceptions that are non[]consensual under Chapter 119 of Title 18 of the United States Code," and that intention did not change, even with the amendments to Mil. R. Evid. 317 in 2013, which were not intended to change rules on admissibility. *See also* Stephen A. Saltzburg, et.al., Military Rules of Evidence Manual § 317.02 (9th ed. 2024) ("The Drafters' Analysis indicates an intention to limit Rule 317(c) to nonconsensual interceptions, although the language of subdivision (c) does not make this clear."). Since Mil. R. Evid. 317(c) only applies to *nonconsensual* intercepts, the Mil. R. Evid. 317(c) exclusionary rule should not apply here, since the intercept was consensual, being obtained with SrA TP's consent.

Even assuming, arguendo, that Appellant had some basis for exclusion of the intercepted evidence under Mil. R. Evid. 317(c) based on AFOSI's failure to strictly comply with their own regulations, the argument should still fail. The entire argument rests on AFOSI agent's alleged failure to properly use Form 52 to request authorization for the wire intercept. Here, no question exists that the AFOSI agents used Form 52 in their coordination for approval. (R. at 27-29, 31-33; App. Ex. XI at 21-25.) Accordingly, the military judge specifically entered that finding of

fact before reaching his ruling. (App. Ex. XVI at 2.) The Form was also provided to the court as an attachment to the Defense's written motion to suppress. (App. Ex. XI at 21-25.) The form indicates that all of the proper fields were completed and that the correct coordination occurred, pursuant to AFOSI Manual 71-103. (Id.) Notably, the Form 52 indicates that the requesting agent digitally signed the request on 20 April 2022. The form also shows that prior coordination with the reviewing official (AFOSI 4th Field Regional Office) and AFOSI/JA was accomplished on 20 April 2022, as evidenced by the respective digital signatures – the day before the intercept was conducted. Above all, it was never contested at trial that the approval authority did, in fact, actually authorize wire intercept before it was conducted, nor is it contested now. (R. at 27-36; App. Ex. XVI at 2.)

While it remains undisputed that the OSI agents *did* have approval from the proper authority prior to carrying out their wire operation, Appellant rests his argument solely on a technicality. He asserts that the oral approval, conveyed in writing through a designee, was insufficient because the regulation required the approving authority to actually sign the Form 52 before the OSI agents could act on the approval they unquestionably had.

AFOSI Manual 71-103 simply directs that Form 52 "must be used to request authorization." As discussed, no question exists that the form was completed and routed for appropriate coordination. As highlighted by the military judge, this manual says nothing about a requirement to get authorization from the approval authority prior to acting on the authorization. Instead, the manual simply states that, prior to conducting an intercept, an investigator must *request* written approval, not that he obtain it. Further, while it's acknowledged that DoDI 5505.09 does mention written approval, there's no contest that the appropriate authority *did*

provide his authorization *in writing*. It just happened to be recorded on the Form 52 on the day following the intercept the approval authority had already approved.

AFOSI substantially complied with the AFOSI Manual and DODI. They obtained consent to from SrA TP before conducting the intercept to ensure they did not violate the Fourth Amendment. They received approval from the appropriate authority before conducting the consensual intercept and documented the approval in writing the next day. Verbal authorization is allowed under the DoDI, and the approval authority should have significant discretion to decide when one of the emergency factors is met. Since the DoDI is not intended to create any substantive or procedural right enforceable by law against the government, the convening authority's decision to grant verbal approval is not something that a trial court should second guess. And a trial court certainly should not rule that the fruits of a consensual intercept are inadmissible solely based on a disagreement with the approval authority about whether a certain scenario qualified for emergency verbal approval. Any deviation from the procedures in the DoDI or AFOSI Manual was minimal, and Appellant did not have an enforceable right to have OSI obtain written, as opposed to verbal, consent before the intercept was conducted. As a result, the interception was "authorized under regulations issued by the Secretary of Defense or Secretary concerned" and was not otherwise unlawful under applicable federal statutes, in accordance with Mil. R. Evid. 317(c). *See* United States v. Shabazz, 52 M.J. 585 (N-M. Ct. Crim. App. 1999) ("Finally, we agree with the military judge that NCIS was in substantial compliance with the Department of Defense Directive governing the interception of wire and oral communications and, even if NCIS had not been in substantial compliance, since the applicable directive explicitly states that it provides 'guidance for the operation of the Department of Defense, but is not intended to, does not, and may not be relied on to create any

right or benefit, substantive or procedural, enforceable by law against the United States,' we find that such a violation, had it occurred, would not violate any of the appellant's constitutional rights and provides no basis for excluding the tape recording.") The military judge did not abuse his discretion in admitting the evidence from the consensual intercept.

Finally, even if Appellant were correct that the OSI agents needed written approval prior to executing their operation and this Court were to find that the military judge abused his discretion or misapplied the regulation in issuing his ruling to admit the evidence, Appellant still fails to demonstrate any prejudice. Appellant contends that but for these recorded admissions, the finder of fact likely would not have believed CL's testimony that Appellant ran her information through OLETS and he would have been found not guilty. (App. Br. at 18.) This incredibly speculative assertion is contrary to the current state of the law. Based on CL's testimony, and even without Appellant's statements, the finder of fact did have sufficient evidence before it to conclude that Appellant at least accessed OLETS with CL's information on two occasions; one in March 2020 and another when he told her he did a background check for a base pass. (R. at 309.)

Based on the reasons outlined above, this Court should find that the military judge did not abuse his discretion or misapply the law in admitting the Appellant's intercepted statements as evidence and deny Appellant's assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's assignments of error and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY BRIEF**
	)	Before Panel No. 2
v.	)	
	)	No. ACM 23045
Senior Airman (E-4) **MATTHEW B. ERICSON** United States Air Force	)	30 September 2024
Appellant	)	

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

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Matthew B. Ericson, Appellant, hereby files this reply to the Appellee's Answer, filed 23 September 2024 (Answer). SrA Ericson stands on the arguments in his brief, filed 23 August 2024 (Appellant's Br.), and in reply to the Answer submits the additional arguments for the issues listed below.

II.

THE CONVICTION OF THE SPECIFICATION OF CHARGE III IS LEGALLY AND FACTUALLY INSUFFICIENT.

There are only two discrete acts of SrA Ericson using a government computer to access C.L.'s information, one in October 2019 and one in March 2020. Undersigned counsel originally briefed that there were three instances of use of a government computer in error. Appellant's Br. at 8-9. Further review of the record reflects only two specific instances—one in October 2019 and one in March 2020. *See* R. at 309, 311 (where C.L. testified he looked up her information when they first dated, which was October 2019, and where he looked her information up to get her a base pass in March 2020); *see also* R. at 576 (where SrA Ericson admitted he looked up her information when he got her a base pass, and that he used her information as training when he was

getting her the pass). SrA Ericson's use of the Oklahoma Law Enforcement Telecommunication System (OLETS) in March 2020 is more consistently argued as two justifications for the search, not two separate searches.

1. *There is no issue of variance because the members considered, but rejected any finding related to the October 2019 conduct when they did not make findings by exceptions and substitutions.*

By asking this Court to review this issue as a matter of variance, the Government is asking this Court to affirm a conviction on a basis that is different from the findings of the members. Answer at 13. Since the members did not alter the specification with their findings, R. at 757, determining now on appeal that a difference between the evidence and the charged timeframe was a permissible variance would mean altering the findings of the court to SrA Ericson's detriment. Such a holding would also constitute a finding on appeal that the members could have, but declined to, reach. This would go beyond this Court's power under Article 66, UCMJ. "[E]xceptions and substitutions . . . may not be made at the appellate level, and, relatedly reviewing courts may not 'revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.'" *United States v. English*, 79 M.J. 116, 119 (C.A.A.F. 2019) (citations omitted). In declining to affirm this conviction on a basis that is different from the finding of the members, this is also consistent with the principle that an appellate court may not affirm a conviction on a theory not presented to a trier of fact and adjudicated beyond a reasonable doubt. *See United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) (citations omitted). Despite this, the Government asks this Court to apply the variance standard to incorporate the October 2019 conduct in order to resolve the issue of the legal and factual sufficiency of SrA Ericson's conviction for conduct between on or about 1 March 2020 and on or about 21 April 2022. Answer at 10-13. The members considered all the evidence but did not make any findings by substitutions and exceptions. R. at

757. Therefore, this Court should not revise the basis on which SrA Ericson was convicted,[1] but rather exercise its authority to review the factual sufficiency of the members' actual findings related to the charged conduct in March 2020.

2. The evidence is legally and factually insufficient.

SrA Ericson's singular use of OLETS in the March 2020 timeframe was authorized for *two reasons*. R. at 576. There were not two searches completed for different purposes. *Compare* R. at 576 (where SrA Ericson described running C.L.'s information while training new BDOC controllers on how to issue a base pass), *with* R. at 309, 311 (where C.L. testified SrA Ericson told her he ran her information when they first started dating in 2019, and when he got her a base pass).

There is no evidence SrA Ericson surreptitiously accessed C.L.'s private information to run a background check. Nothing in the record states or implies SrA Ericson got C.L.'s personal information to run the search in OLETS from anyone other than C.L. *See* R. at 311-12 (where C.L. discusses having a background check to get a pass and being on-base), *see also* R. at 576 (where SrA Ericson described running the search to get her a base pass so she could visit him and using that instance to train members of BDOC Alpha). M.C. testified an individual would need specific information like name, birthdate and social security number to look up anyone in OLETS. R. at 630. Based on these facts, it is a reasonable inference that C.L. gave her personal information to SrA Ericson to get access to base as that type of information would not be common knowledge, even in a dating relationship. This is also consistent with the record, which shows C.L. did in fact

[1] If this Court adopts the view that there was more than one instance where SrA Ericson misused a government computer, and that any one of them could support the conviction, Answer at 9, 13, that interpretation raises the issue of whether the finding of guilt is ambiguous. *See United States v. Walters*, 58 M.J. 391, 396-97 (C.A.A.F. 2003) (where if there no indicating on the record which incidents form the basis of the conviction, then the findings of guilt are ambiguous and the Court cannot perform a factual sufficiency review).

visit base in March 2020, without difficulty. R. at 312. Presumably, that is because she had a valid pass, obtained by SrA Ericson as a BDOC controller, on her behalf.

Given SrA Ericson's role as a BDOC controller and trainer, when SrA Ericson ran C.L.'s information for two authorized purposes, this use of a government computer was not unlawful. While A.M. testified that OLETS is used for official purposes and gave some examples of such purposes including investigations and traffic stops, R. at 622, nothing in his testimony constituted an exclusive list for the use of OLETS. Rather those examples were merely illustrative of authorized purposes—which would include running someone's information for base access and also for training purposes. Moreover, the Government's assertion that SrA Ericson's agreement to T.P.'s question "you [ran her information through OLETS] on your own account," R. at 575, is equivalent to SrA Ericson running it for "his own [duty-unrelated] purpose" strains common sense and has no factual basis from the record. Answer at 15. At the time T.P. asked SrA Ericson this question, they were discussing whether there was evidence to support the allegations. R. at 575. One such piece of evidence was that SrA Ericson used his own account to run C.L.'s information for a base pass. R. at 575-76. Thus, the evidence itself is excludes the Government's interpretation. *Id.*

In reviewing whether a rational trier of fact could find all elements of the offense beyond a reasonable doubt, this Court cannot look past SrA Ericson's role as a BDOC controller—and how use of OLETS is tied to those official duties—when it analyzes whether SrA Ericson's actions in March 2020 related to C.L. and his use of OLETS was authorized. There is no evidence that dating someone would preclude an individual from carrying out their authorized duties as a BDOC controller, which includes using OLETS for base access. *Compare* R. at 627 (where the dating relationship itself cannot justify use of OLETS, but the record is silent whether there is any

prohibition for a BDOC controller to look up a friend or intimate partner's information in carrying out their official duties), *with* R. at 625, 628 (where SrA Ericson was a BDOC controller with need to access OLETS as part of his official duties from October 2019 to October 2021).

With the exclusion of the October 2019 conduct, SrA Ericson's role as a BDOC controller, his statements that he ran C.L.'s information once for two valid purposes, and the consistency of those statements with C.L.'s testimony about her first trip to base in March 2020, the evidence is insufficient to meet the very low threshold to sustain a conviction for legal sufficiency. Based on this evidence, a rational trier of fact also could not have determined this evidence established guilt beyond a reasonable doubt because SrA Ericson's use of the government computer was not clearly contrary to the interests or intent of C.L. when it was done for her benefit—to access base.

Should this Court find the conviction legally sufficient, SrA Ericson's conviction is not factually sufficient. After weighing the evidence in the record of trial—the uncontested admissions of SrA Ericson to his friend T.P. that were recorded without his knowledge and without motive to fabricate—it is evident SrA Ericson never accessed a government computer in a manner that was clearly contrary to the interests or intent of C.L. Viewing the evidence in the record with a fresh, impartial look, SrA Ericson could only get the specific personally identifiable information to run a background check on her if she had given him that information and SrA Ericson's admission of running a check on her to get a base pass is consistent with C.L.'s testimony about why he ran a check on her. The use of the government computer was not clearly contrary to the interests of C.L.—she was allowed on-base, presumably without incident in March 2020. R. at 312. Based on a fresh impartial look at the evidence, an independent determination on each element will lead this Court to a finding of not guilty. The Government does not have proof beyond a reasonable doubt SrA Ericson accessed a government computer for an unauthorized purpose.

WHEREFORE, SrA Ericson requests this Honorable Court set aside the finding of guilty for the specification and Charge III and the sentence.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE WIRE INTERCEPT AUDIO WHEN LAW ENFORCEMENT OBTAINED THE RECORDING IN VIOLATION OF THE GOVERNING REGULATION.

The Government's assertion that there is no exclusionary rule that could apply to SrA Ericson's statements recorded via wire intercept because one party consented is erroneous. Answer at 19, 21. To avoid triggering the inadmissibility of evidence obtained under Mil. R. Evid. 317(c)(3), there are two requirements the Government must meet: (1) the oral or wire intercept must be authorized under the regulations issued by the Secretary of Defense or the Secretary concerned and (2) it must not be unlawful under the applicable federal statute. Mil. R. Evid. 317(c)(3). Thus, while one party consented in this case, that answers only the latter half of the two questions in determining whether the evidence should have been admissible. Mil. R. Evid. 317(c)(3). One-party consent simply means it is not otherwise unlawful under the applicable federal statute. *See* 18 U.S.C. § 2511(2)(c).

But the text of Mil. R. Evid. 317(c)(3) plainly states that evidence is not admissible unless both of two conditions are met. "It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning." *United States v. Mooney*, 77 M.J. 252, 255 (C.A.A.F. 2018) (quoting *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005)). The Government points to the drafter's intent to interpret the meaning and effect of the Rule. Answer at 19. It is true, the drafter's intent was to require the exclusionary rule under Mil. R. Evid. 317(a) for noncompliance with 317(c) only when required by the Constitution or by an appliable statute. *Manual for Courts-Martial, United States* (2016 ed.) (*MCM)*, App. 22 at A22-36. However, this

Court need not turn to the purported intent behind the rule because the plain language rule dictates that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, the language of the statute itself supports the exclusion of this evidence.

Enforcing the inadmissibility of evidence under Mil. R. Evid 317(c)(3) for oral or wire intercepts that are not authorized under the regulations is also consistent with Supreme Court precedent. "It is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) (quoting *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). When the Government does not follow its regulations in seizing evidence, it is proper to exclude evidence. *Id*. In *Dillard*, the court excluded evidence that was seized pursuant to an oral search authorization when written authorization was required. *Id.* The Court of Military Appeals, in making that decision, also considered the Supreme Court decision in *United States v. Caseres. Id. Caseres* would appear to prevent the exclusion of evidence based solely on the Government's failure to follow their own regulations in the collection of evidence. *United States v. Caceres*, 440 U.S. 741, 757 (1979). However, the decision in *Caseres* is distinguishable because the text of the IRS regulation at issue in that case did not set the Government's compliance with its own rule as a threshold, leading the Supreme Court to consider the applicability of the Fourth Amendment, whereas here exclusion is plainly mandated by the text of Mil. R. Evid. 317. *Compare id.* (where the IRS regulation did not mention admissibility of evidence obtained in violation of the regulation), *with* Mil. R. Evid. 317(c)(3) (where evidence is *inadmissible* unless the oral or wire intercept is authorized under the regulations issued by the Secretary of Defense or

the Secretary concerned and it is not unlawful under the applicable federal statute). Thus, the decision in *Dillard* remains applicable here. The Government must comply with its own regulations, when those regulations protect personal liberties or interests, and exclusion of the evidence is mandated when the Government fails to comply. *Dillard*, 8 M.J. at 213.

Therefore, notwithstanding that one party consented to the recording (Answer at 19), the Government must still show that the oral or wire intercept was authorized under the regulations. Mil. R. Evid. 317(c)(3). The Government cannot meet that burden. Neither the AFOSI Manual nor the DODI instruction contemplate anything other than written authorization when it is not an emergency for the Government to intrude into the private life of SrA Ericson by recording his private conversation with a friend in his home. *See* App. Ex. XIV (where only the DD Form 52 is used to approve oral and wire intercepts), *see also* Department of Defense Instruction (DODI) O-5505.09, *Interception of Wire, Electronic, and Oral Communications for Law Enforcement*, 16 May 2016 (Incorporating Change 2), Enclosure 3, para 2.a.(4) (where consensual intercepts of wire, electronic or oral communications *will be authorized in writing*) (emphasis added)). It is not disputed that written authorization was not given prior to the intercept. As a result, this wire or oral intercept was not authorized by the regulations.

To overcome the Government's shortfall in conducting this wire or oral intercept that is not authorized under the regulations, the Government now argues it was an emergency. Answer at 22. Yet the Government's witness firmly denied this at trial. *See* R. at 34 (where K.C., an agent with AFOSI, testified that there was no emergency and no concern of loss of evidence). This also contradicts the approving authority's reason for granting verbal approval, which appeared to be discretionary. App. Ex. XII at 5 (where the regional commander had not checked his emails or

messages and there was no indication any emergency or inability to check email or messages was related to any emergent situation).

This Court should not give the Government a windfall here when they deviated from the governing regulations without cause. Answer at 22. This wire or oral intercept was never authorized by the regulations because the regulations only contemplate prior written authorization, which the Government did not have. While this case may appear to turn on a technicality, the decision to draft the regulations this way is not one for the Court to correct. *See generally Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (where the Supreme Court was unwilling to change the import of Congress' chosen words noting the Court's longstanding deference to the supremacy of the Legislature and recognition that Congressmen typically vote on the language of the bill). Here, whatever the drafters may have intended, what they wrote is that evidence obtained via a wire or oral intercept is inadmissible unless both authorized by the regulation and not contrary to federal law. Mil. R. Evid. 317(c)(3).

WHEREFORE, SrA Ericson requests this Honorable Court set aside the finding of guilty for the specification and Charge III and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 September 2024.

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