

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

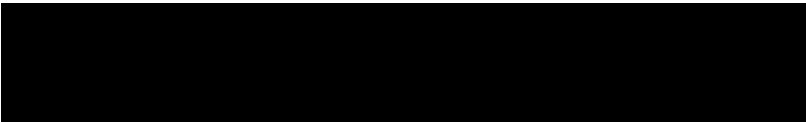
UNITED STATES	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME (FIRST)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	17 November 2023
)	
<i>Appellant</i>)	

**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 **30 January 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 46 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 17 November 2023.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

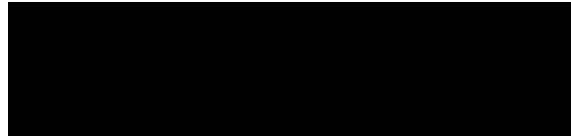
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

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

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

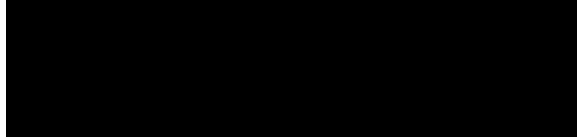
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 21 November 2023.



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	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (SECOND)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	23 January 2024
<i>Appellant</i>)	

**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 **29 February 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

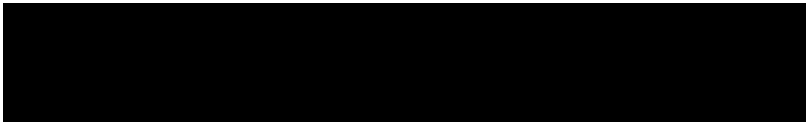
On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 23 January 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

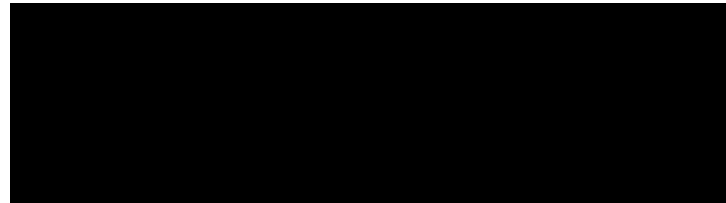
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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.

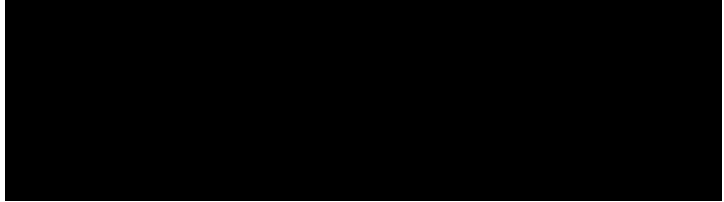
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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 January 2024.



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	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (THIRD)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	15 February 2024
<i>Appellant</i>)	

**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 **30 March 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

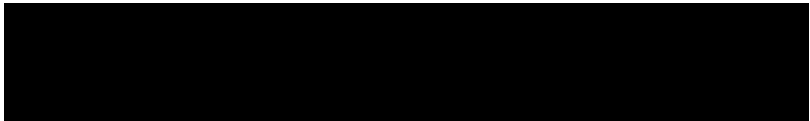
On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 15 February 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

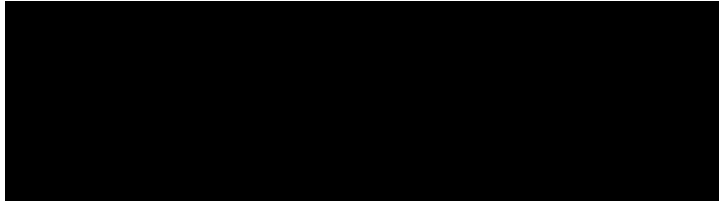
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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.

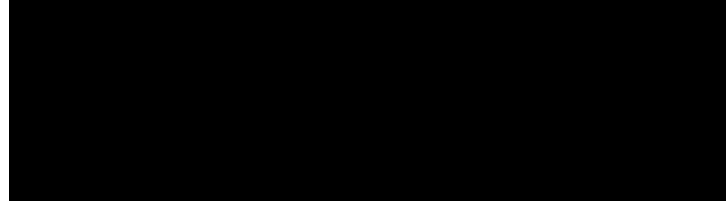
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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 20 February 2024.



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	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME (FOURTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	20 March 2024
)	
<i>Appellant</i>)	

**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 **29 April 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 17 cases; 13 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned counsel is presently working with civilian co-counsel in drafting a petition for grant of review and corresponding supplement.

The following cases before this Court have priority over the instant case:

- 1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel filed appellant's reply brief last week on 15 March 2024. This appellant is currently confined.
- 2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned and civilian counsel have completed their review of the record and have begun research and drafting of potential assignment of errors. This appellant is not currently confined.
- 3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the record and identified several potential issues. This appellant is confined.
- 4) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages. Undersigned and civilian counsel have reviewed the record, identified

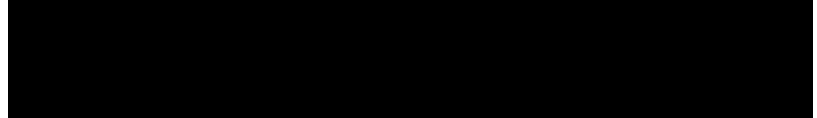
several potential issues, and begun research on those issues. This appellant is not currently confined.

- 5) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. This appellant is confined.
- 6) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. This appellant is confined.
- 7) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not currently confined.
- 8) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is confined.
- 9) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. This appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 20 March 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

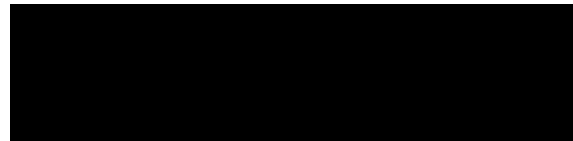
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

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

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

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



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 22 March 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	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (FIFTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	19 April 2024
<i>Appellant</i>)	

**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 **29 May 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 18 cases; 13 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned counsel is presently working with civilian co-counsel in drafting a petition for grant of review and corresponding supplement.

The following cases before this Court have priority over the instant case:

- 1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Oral argument is scheduled for 24 April 2024 and undersigned counsel is presently preparing for that argument. This appellant is currently confined.
- 2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned and civilian counsel filed the initial AOE, with the Government's reply due on 6 May 2024. Any reply brief will be due on 13 May 2024. This appellant is not currently confined.
- 3) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel has completed his initial review of the record and has begun research on potential AOE's. This appellant is confined.

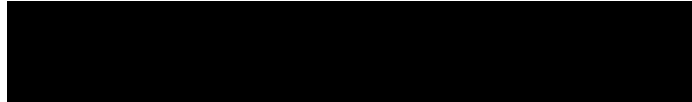
- 4) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 Appeal. The Government’s initial brief is due on 6 May 2024, with this appellee’s answer being due on 27 May 2024. Undersigned counsel has begun a review of the record.
- 5) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the unsealed record and identified several potential issues. This appellant is confined.
- 6) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. This appellant is confined.
- 7) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not currently confined.
- 8) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is confined.
- 9) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. This appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant’s case. An enlargement of time is necessary to allow counsel time to fully review Appellant’s case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this

enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

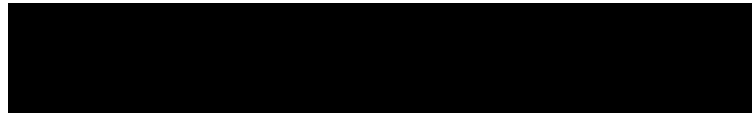


TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 19 April 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

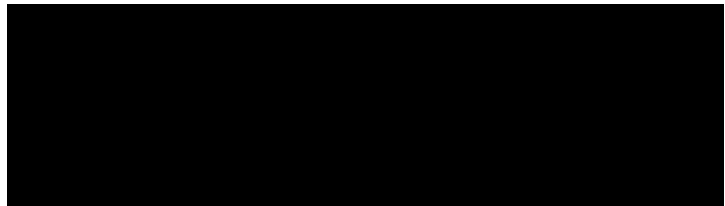
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

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

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

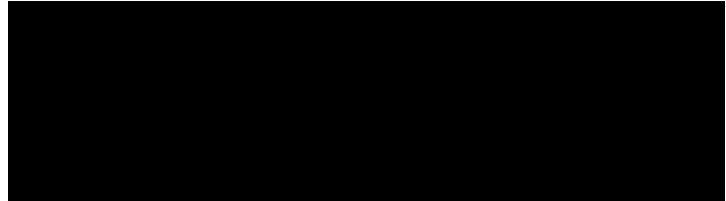
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(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 April 2024.



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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

This case was docketed with the court on 2 October 2023. On 19 May 2024 (230 days after docketing), 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 22d day of May, 2024,

ORDERED:

Appellant’s Motion for Enlargement of Time (Sixth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 June 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant’s counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court’s Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant’s right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel’s progress on Appellant’s case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Given the amount of time already elapsed from docketing through this current enlargement of time request, Appellant’s counsel are advised that any requests for future enlargements of time may necessitate a status conference

prior to the court taking action on any forthcoming request.* Appellant's counsel is further advised any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Commissioner

* The court notes Appellant's case currently holds eighth priority amongst his counsel's cases. Appellate defense counsel is advised that an explanation for these case priorities would be a likely topic of discussion at any forthcoming status conference considering any future enlargements of time in this case, particularly insofar as Appellant is currently confined.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (SIXTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	19 May 2024
<i>Appellant</i>)	

**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 **28 June 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 23 cases; 16 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned counsel is presently working with civilian co-counsel in drafting a petition for grant of review and corresponding supplement.

The following cases before this Court have priority over the instant case:

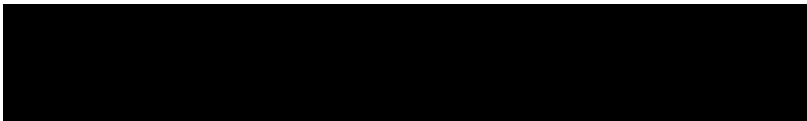
- 1) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel filed an assignment of error on 13 May 2024. The Government's answer is due on 12 June 2024, with any reply being due on 19 June 2024. This appellant is confined.
- 2) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 Appeal. The Government's initial brief is due on 6 May 2024, with this appellee's answer being due on 27 May 2024. Undersigned counsel has begun drafting this appellee's answer.
- 3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the unsealed record and identified several potential issues. This appellant is confined.
- 4) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. This appellant is confined.

- 5) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not currently confined.
- 6) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is confined.
- 7) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. This appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel's review of his case. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

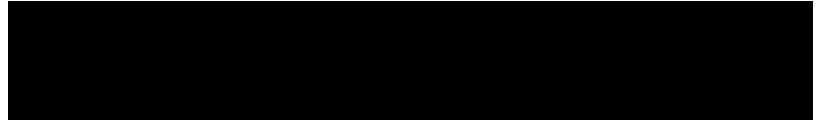


TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 19 May 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

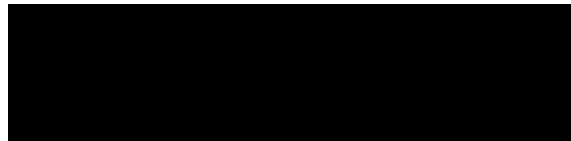
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

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

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

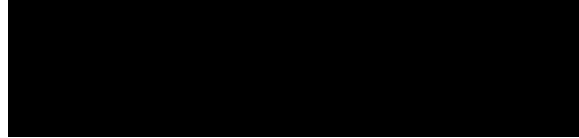
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME(SEVENTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	18 June 2024
<i>Appellant</i>)	

**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 **28 July 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 25 cases; 19 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel is presently conducting research in preparation to submit a petition and corresponding supplement to the CAAF, which is due on 1 August 2024. The following cases before this Court have priority over the instant case:

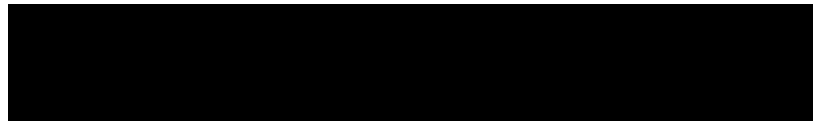
- 1) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 Appeal. While undersigned counsel filed this appellee's answer on 28 May 2024, the Government moved for oral argument on 5 June 2024. Should this Court grant that motion, preparation for oral argument will take priority over the instant case.
- 2) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has reviewed the sealed exhibits as well as portions of the unsealed transcript. Today, 18 June 2024, undersigned counsel submitted an Article 138, UCMJ, complaint on behalf of this appellant. Undersigned counsel has also been conducting research on several identified issues. This appellant is confined.
- 3) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun a review of the record and identified several potential issues. This appellant is confined.
- 4) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not currently confined.

- 5) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is confined.
- 6) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record. This appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant’s case. An enlargement of time is necessary to allow counsel time to fully review Appellant’s case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel’s review of his case.¹ Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



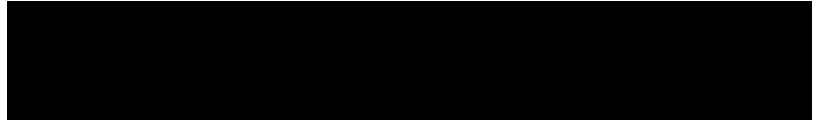
TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

¹ Appellant consents to this limited disclosure of an attorney-client confidential communication.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 June 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

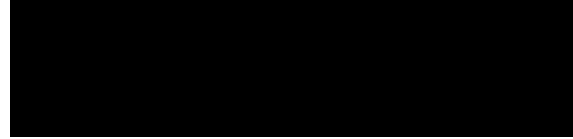
UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 to file an Assignment of Error in this case.

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 360 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. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

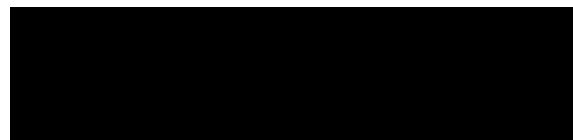
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 21 June 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 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

This case was docketed with the court on 2 October 2023. On 18 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 22d day of July, 2024,

ORDERED:

Appellant’s Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **27 August 2024**.

Any forthcoming requests for enlargements of time will include a specific statement as to counsel’s progress on the case; specifically, the number of transcript pages and exhibits reviewed to date, and the anticipated date of the completion of any remaining record review. Given the amount of time already elapsed since docketing, Appellant’s counsel are advised that any requests for future enlargements of time may necessitate a status conference.

Appellant’s counsel is further advised any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (EIGHTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	18 July 2024
<i>Appellant</i>)	

**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 **27 August 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 23 cases; 17 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel is presently conducting research in preparation to submit a petition and corresponding supplement to the CAAF, which is due on 1 August 2024. The following cases before this Court have priority over the instant case:

- 1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel filed the initial AOE brief on 16 July 2024. The Government's Answer is due on 15 August 2024, with any reply being due on 22 August 2024. This appellant is not confined.
- 2) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. Undersigned counsel has completed a review of the unsealed record. Yesterday, 17 July 2024, this Court granted undersigned counsel's consent motion to review sealed materials; such review will be completed next week. Undersigned counsel anticipates filing an initial AOE with this Court next week. This appellant is confined.
- 3) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun a review of the unsealed record and identified several potential issues. On 15 July 2024, undersigned

counsel filed a consent motion to review sealed materials; if granted, that review will be accomplished next week. This appellant is confined.

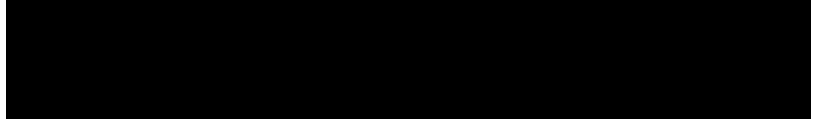
- 4) *United States v. Kelhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has completed an initial review of the record. This appellant is not confined.
- 5) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record and identified potential errors. This appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel's review of his case.¹ Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

¹ Appellant consents to this limited disclosure of an attorney-client confidential communication.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 July 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

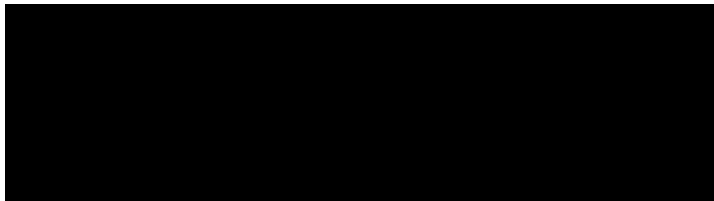
UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 to file an Assignment of Error in this case.

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

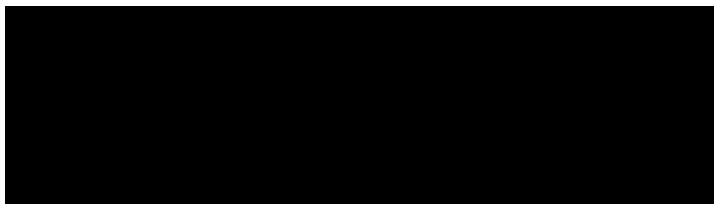
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



J. 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 18 July 2024.



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (NINTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	16 August 2024
<i>Appellant</i>)	

**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 **26 September 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 319 days have elapsed. On the date requested, 360 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 20 cases; 9 cases are pending initial AOE's before this Court. Two cases before the Court of Appeals for the Armed Forces (CAAF) have priority over this case: *United States v. Valentin-Andino* and *United States v. Daughma*. Undersigned counsel is presently conducting research and drafting a corresponding supplement for *United States v. Valentin-Andino*, which is due on 27 August 2024. The following cases before this Court have priority over the instant case:

- 1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel filed the initial AOE brief on 16 July 2024. The Government's Answer was filed yesterday, 15 August 2024, and appellant's Reply is due on 22 August 2024.
- 2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel filed an initial assignment of errors brief with this Court on 13 August 2024. The Government's Answer is due on 12 September 2024, with any reply due on 19 September 2024.
- 3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has completed an initial review of the record. This appellant is not confined.
- 4) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the

transcript is 531 pages. Civilian co-counsel has begun reviewing the record and identified potential errors. This appellant is not currently confined.

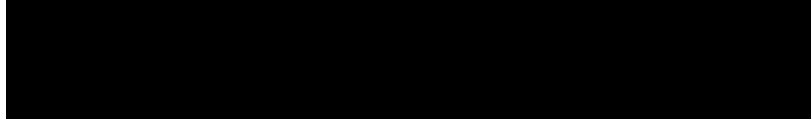
Pursuant to this Court's Order, dated 22 July 2024, undersigned counsel offers the following, additional information: undersigned counsel has not made progress on Appellant's case; undersigned counsel has reviewed no pages of the transcript and no exhibits within the record. Undersigned counsel anticipates completing a review of Appellant's record no later than 31 October 2024. While undersigned counsel has not made progress on Appellant's case, he has been diligently working other matters. Since Appellant's Motion for Enlargement of Time (Eighth), undersigned counsel has completed the review of two other cases and filed briefs with this Court (*United States v. Rice* and *United States v. Couty*). Additionally, undersigned counsel completed a review of the record in *United States v. Valentin-Andino*, conducted research, and drafted most of the supplement for C.A.A.F (due 27 August 2024). Last, undersigned counsel has begun drafting a reply brief for the case of *United States v. Pulley*.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel's review of his case.¹ Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

¹ Appellant consents to this limited disclosure of an attorney-client confidential communication.

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

Respectfully submitted,

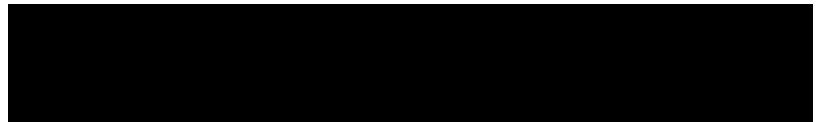


TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES’
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT’S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 to file an Assignment of Error in this case.

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

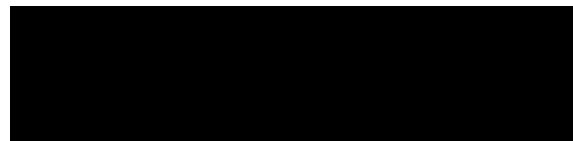
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 August 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 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

On 16 September 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

In his motion, Appellant’s counsel asserts that his other duties have prevented him from making any progress in reviewing Appellant’s record of trial and drafting a brief in Appellant’s case. In his own word’s Appellant’s counsel asserted: “The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant’s case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.” Appellant’s counsel anticipates completing the review of the seven-volume record, consisting of a 1,084-page trial transcript, 40 appellate exhibits, 26 prosecution exhibits, and 11 defense exhibits, no later than 31 October 2024.*

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 23d day of September, 2024,

ORDERED:

Appellant’s Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **26 October 2024**.

* The court commends Appellant’s counsel for his candor in describing the lack of progress in reviewing Appellant’s case. We also appreciate Appellant’s counsel’s fulsome explanation of why his other duties have prevented him from making progress on Appellant’s case.

Any subsequent motions for enlargement of time will likely require a status conference with all assigned counsel prior to the court's ruling on any such motion.

Appellant's counsel are reminded that at the expiration of this enlargement of time, 390 days will have elapsed from the docketing of Appellant's case. Any future requests for enlargements of time that will likely not be granted absent *exceptional circumstances*. Counsel should come prepared to discuss and substantiate any qualifying exceptional circumstances during any future status conference ordered by the court.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME (TENTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	16 September 2024
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 October 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 350 days have elapsed. On the date requested, 390 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 20 cases; 14 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Daughma*. Undersigned counsel has drafted a supplement to accompany a petition for grant of review, which will be filed by the end of this week. The following cases before this Court have priority over the instant case:

- 1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. While filing is complete in this case, this appellant moved for oral argument. Should this Court grant oral argument, preparation for that argument would take priority over this case.
- 2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. The Government filed its answer in this case on 12 September 2024. Undersigned counsel is presently drafting a reply, which is due on 20 September 2024.
- 3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has completed a review of the entire record and is presently drafting an assignment of errors brief, to be filed no later than 23 September 2024.
- 4) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the

transcript is 531 pages. Civilian co-counsel has begun reviewing the record and identified potential errors. Undersigned counsel has begun a review of the exhibits and pre-trial documents in this case.

On 22 July 2024, this Court ordered that “any forthcoming requests for enlargements of time will include a specific statement as to counsel’s progress on the case; specifically, the number of transcript pages reviewed to date, and the anticipated date of the completion of any remaining record review.” Order, 22 July 2024. Pursuant to that order, undersigned counsel offers the following, additional information: undersigned counsel has not made progress on Appellant’s case; undersigned counsel has reviewed no pages of the transcript and no exhibits within the record. Undersigned counsel anticipates completing a review of Appellant’s record no later than 31 October 2024.

While undersigned counsel has not made progress on Appellant’s case, he has been diligently working other matters. Since Appellant’s Motion for Enlargement of Time (Ninth), undersigned counsel drafted and filed a supplement to the CAAF in *United States v. Valentin-Andino* and drafted a supplement in *United States v. Daughma*. Additionally, undersigned counsel completed a review of *United States v. Kelnhofer* and drafted two of three anticipated assignments of error. Additionally, undersigned counsel conducted research on, and drafted and filed a motion for, reconsideration of this Court’s denial of an EOT in *United States v. Couty*. Further, undersigned counsel reviewed the Government’s answer in *United States v. Couty* and has begun drafting a reply. In addition to these tasks, undersigned counsel reviewed draft peer filings in seven cases, spanning 164 pages and 15 issues. Last, undersigned counsel began a review of *United States v. Moreno*, specifically reviewing the exhibits and pre-trial documents.

In the same order referenced above, this Court also stated that “any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.” Order, 22 July 2024. The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant’s case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant’s case or that require review at the CAAF. For example, approximately one week after the instant case was docketed, the CAAF granted review in *United States v. Smith*. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel* and *United States v. Daughma*—significantly older cases than Appellant’s. Moreover, since the docketing of this case, undersigned counsel has reviewed 17 records of trial for cases older than Appellant’s case. These records contained 10,688 transcript pages. Undersigned counsel has filed 11 briefs before this Court, not including two substantive motions. In addition, undersigned counsel has filed seven briefs before the CAAF (to include five supplements and two substantive briefs in *United States v. Smith*). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and this Court in *Daughma*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court’s broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel’s limited progress so far is not due to an unwillingness to familiarize himself with the case

or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant's case. However, no such substitute counsel has been identified due to the Appellate Defense Division's workload. Though subject to manual counting, as of 13 September 2024, the Division's records reflect 111 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the nineteen fewer cases now reflect fifty-two percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-four percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 138 cases eligible for direct appeal forwarded to the Division's counsel versus 186 automatic appeals over that same time; (2) the Division's robust practice before the CAAF during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court; (3) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division's counsel.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being

on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division's active duty staffing steady at previously existing levels.

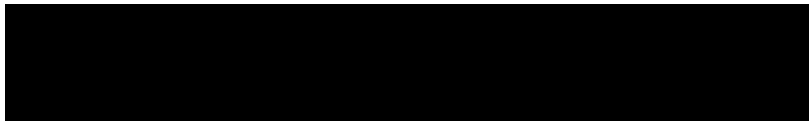
Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel's

review of his case.¹ Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



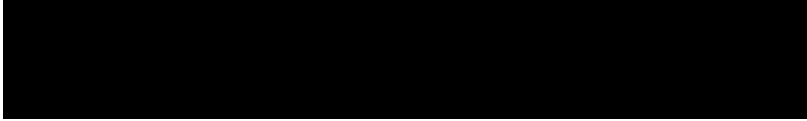
TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

¹ Appellant consents to this limited disclosure of an attorney-client confidential communication.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

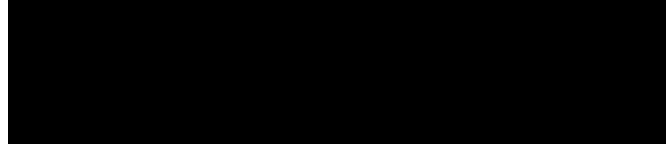
UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 to file an Assignment of Error in this case.

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

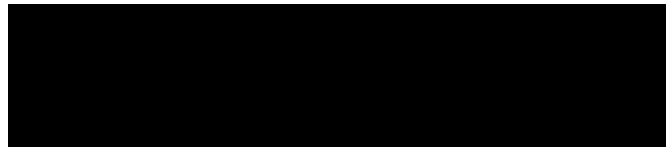
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



JENNY A. LIABENOW, 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 17 September 2024.



JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
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 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

On 16 October 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

In his motion, Appellant’s counsel asserts that his other duties have prevented him from making any progress in reviewing Appellant’s record of trial and drafting a brief in Appellant’s case. As with the last enlargement of time, Appellant’s counsel continues to assert that: “The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant’s case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.” Pursuant to the prior order of this court, Appellant’s counsel provided a new anticipated date of completion for the record review of the seven-volume record, consisting of a 1,084-page trial transcript, 40 appellate exhibits, 26 prosecution exhibits, and 11 defense exhibits. Appellant’s counsel estimates the completion of that task no later than 30 November 2024.

The court has considered Appellant’s motion (including his explicit informed consent to his counsel filing it on his behalf), the Government’s opposition, case law, and this court’s Rules of Practice and Procedure.

Accordingly, it is by the court on this 22d day of October, 2024,

ORDERED:

Appellant’s Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **25 November 2024**.

Any subsequent motions for enlargement of time will likely require a status conference with all assigned counsel prior to the court’s ruling on any such motion.

Appellant's counsel are reminded that at the expiration of this enlargement of time, 420 days will have elapsed from the docketing of Appellant's case. Any future requests for enlargements of time will likely not be granted absent *exceptional circumstances*. Counsel should come prepared to discuss and substantiate any qualifying exceptional circumstances during any future status conference ordered by the court.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME
	)	(ELEVENTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	16 October 2024
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 November 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or

sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 24 cases; 15 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. On 30 September 2024, the CAAF ordered briefing on two issues in *Valentin-Andino*, to include one issue specified by the CAAF which was not specifically raised by that appellant. Undersigned counsel has been conducting research on those issues and has begun drafting a brief on behalf of appellant, to be filed no later than 30 October 2024. The following cases before this Court have priority over the instant case:

- 1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. While filing is complete in this case, this appellant moved for oral argument. Should this Court grant oral argument, preparation for that argument would take priority over this case.
- 2) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel filed an assignment of errors brief on 23 September 2024. The Government's answer is due on 23 October 2024, with any reply due on 30 October 2024.
- 3) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Undersigned counsel has completed a review of this case and

identified several potential errors. Additionally, undersigned counsel has begun research on two of the identified errors. Civilian co-counsel in this case suffered an injury to his left retina, which necessitated another motion for EOT in this case.

On 22 July 2024, this Court ordered that “any forthcoming requests for enlargements of time will include a specific statement as to counsel’s progress on the case; specifically, the number of transcript pages reviewed to date, and the anticipated date of the completion of any remaining record review.” Order, 22 July 2024. Pursuant to that order, undersigned counsel offers the following, additional information: undersigned counsel has not made progress on Appellant’s case; undersigned counsel has reviewed no pages of the transcript and no exhibits within the record. In Appellant’s Motion for Enlargement of Time (Tenth), undersigned counsel proffered that a review of Appellant’s case would be complete before 31 October 2024. However, due to the CAAF’s grant in *Valentin-Andino*—as well as other priorities referenced below—undersigned counsel no longer believes this is feasible. Undersigned counsel anticipates completing a review of Appellant’s entire record no later than 30 November 2024.

While undersigned counsel has not made progress on Appellant’s case, he has been diligently working other matters. Since Appellant’s Motion for Enlargement of Time (Tenth), undersigned counsel drafted and filed a supplement to the CAAF in *United States v. Daughma*. Additionally, undersigned counsel began research on the granted issues in *Valentin-Andino*; this included substantial legislative history research. Moreover, undersigned counsel filed an assignments of error brief in *Kelnhofer*, and a reply brief in *United States v. Couty*, to this Court. Further, undersigned counsel completed a review of the record in *United States v. Beyer*, assisted in drafting assignments of error, and filed an assignments of error brief to this Court. In addition, undersigned counsel reviewed draft peer filings in five cases, spanning 93 pages and 7 issues.

Undersigned counsel also completed a review of *United States v. Moreno*, identified five potential errors, and began research on two of those errors. Last, undersigned counsel completed a review of *United States v. Brice* in order to adequately advise that client on his decision to withdraw from appellate review, which was filed on 14 October 2024.

In the same order referenced above, this Court stated that “any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.” Order, 22 July 2024. The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant’s case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant’s case or that require review at the CAAF. For example, approximately one week after the instant case was docketed, the CAAF granted review in *United States v. Smith*. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel* and *United States v. Daughma*—significantly older cases than Appellant’s. Moreover, since the docketing of this case, undersigned counsel has reviewed 19 records of trial for cases older than Appellant’s case.¹ These records contained 12,767 transcript pages. Undersigned counsel has filed 13 briefs before this Court, not including three substantive motions. In addition, undersigned counsel has filed eight briefs before the CAAF (to include six supplements and two substantive

¹ This includes *United States v. Beyer* which, although not a case older than Appellant’s, required an earlier review because civilian co-counsel was prepared to file an assignment of errors brief. *See, e.g.*, Article 70(c), UCMJ.

briefs in *United States v. Smith*). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and this Court in *Daughma*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant's case. However, no such substitute counsel has been identified due to the Appellate Defense Division's workload. Though subject to manual counting, as of 27 September 2024, the Division's records reflect 117 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the thirteen fewer cases now reflect fifty-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-two percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 141 cases eligible for direct appeal forwarded to the Division's counsel versus 195 automatic appeals over that same time; (2) the Division's robust practice before the CAAF during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military

services heading into the October 2024 term with eight cases—only one fewer than all other services combined—granted review with briefing ordered so far; (3) the high volume of top-priority interlocutory appeals spread amongst the Division’s counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division’s counsel.

Division leadership has worked to mitigate the impact of these cases on the Division’s total workload and its impact on timely resolution of each appellant’s case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel’s parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division’s active duty staffing steady at previously existing levels.

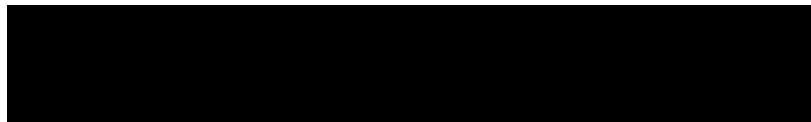
Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division’s workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division’s workload over the last 18

months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel's review of his case.² Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

² Appellant consents to this limited disclosure of an attorney-client confidential communication.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

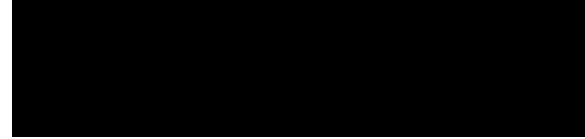
UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 to file an Assignment of Error in this case.

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

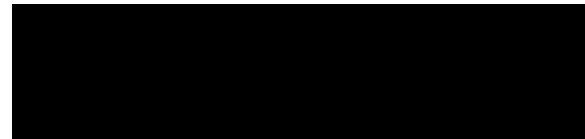
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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 18 October 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 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

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

Some context is necessary to understand the court’s disposition of this latest request, particularly given the repeated latitude of this court in granting prior requests, coupled with this court’s admonitions that *exceptional circumstances* would be necessary for future requests.

After Appellant’s request for a sixth enlargement of time, this court, in its order dated 22 May 2024, began requiring that forthcoming motions include: (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 agreed with the request for an enlargement of time. This court also advised that “any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.”

Nonetheless, exercising patience and latitude, this court continued to grant Appellant’s seventh, eighth, ninth, tenth, and eleventh requests for enlargements of time over the Government’s opposition while Appellant repeated the same purported good cause for delay, *i.e.*, that his personal workload and the overall workload of the office inhibited the assignment of any replacement counsel.

In his latest motion, Appellant’s counsel asserts: “The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant’s case; (2) the number of cases before [the United States Court of Appeal for the Armed Forces]; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.” Nonetheless,

Appellant’s counsel again reaffirmed he anticipated completion of the seven-volume record, consisting of a 1,084-page trial transcript, 40 appellate exhibits, 26 prosecution exhibits, and 11 defense exhibits, by 30 November 2024.

Further, Appellant’s counsel cites a new additional bases for an enlargement of time: (1) attending the Appellate Judges Educational Institute Summit from 14–17 November 2024, in Boston, Massachusetts; and (2) “t[aking] several days of leave to judge an undergraduate moot court tournament at his alma mater.”

The court has considered Appellant’s motion, the Government’s opposition, case law, and this court’s Rules of Practice and Procedure. We determine good cause only exists to grant Appellant’s motion in part.

First, notwithstanding Appellant’s sanguine attitude towards repeated protracted delay in his case, this court is mandated to process appeals in a timely manner. *See, e.g., United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) (“Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals.”). In managing its own appellate practice, this court provided counsel clear expectations—those expectations have not been met.

Second, while counsel’s commitment to his own professional education and the development of advocacy skills for aspiring lawyers are laudable ends, they ought *not* displace or de-prioritize his primary duties of reviewing records and authoring briefs on behalf of his clients. It is not for this court to dictate how counsel run their appellate practices, including the priority of counsel’s cases. But we do expect counsel to appreciate the gravity of this court’s orders concerning “management and disposition of cases” before us. Accordingly, this court does *not* consider those events to constitute “exceptional circumstances” justifying a delay, particularly at this late stage of appellate proceedings.

Third, in light of appellate defense counsel’s averment to completing the record review in this case on or before 30 November, and considering the relative diligence demonstrated by counsel in completing other assigned appellate duties, we deem it appropriate to grant a 14-day enlargement of time.¹

¹ In our order granting Appellant’s tenth motion for an enlargement of time, we commended Appellant’s counsel for his candor in describing the lack of progress in reviewing Appellant’s case, and voiced appreciation for his “fulsome explanation of why his other duties have prevented him from making progress on Appellant’s case.” Nonetheless, candor is no substitute for progress as required at this late stage of appellate proceedings.

Accordingly, it is by the court on this 22d day of November, 2024,

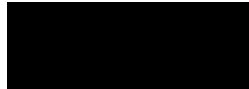
ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED IN PART**. Appellant shall file any assignments of error not later than **9 December 2024**.²

To be clear, the court's expectation is that this will be the **final** enlargement of time as, upon expiration, 435 days will have elapsed from the docketing of Appellant's case. The court is not inclined to grant additional enlargements of time, absent truly *exceptional circumstances*, to accommodate what should be the routine balancing of counsel's appellate duties.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

² We deem the 14-day enlargement of time sufficient in that it allots appellate defense counsel 17 days after his brief is due in another case he has cited as a higher priority.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME
	)	(TWELFTH)
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	15 November 2024
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 December 2024**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 410 days have elapsed. On the date requested, 450 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or

sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AB Sincere N. Gibbs*. Appellant is currently confined.

The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 25 cases; 17 cases are pending initial AOE's before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel has filed an opening brief in that case; the Government's answer is due on 2 December 2024. Any reply will be due no later than 9 December 2024. The following case before this Court has priority over the instant case:

- 1) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Undersigned counsel has completed a review of this case and identified several potential errors. Additionally, undersigned counsel has completed research on three of the identified errors. However, civilian co-counsel (Mr. Crisp) suffered an injury to his left retina which impeded his ability to read. Mr. Crisp has recently received instructions from his doctor that he can begin reading again.

On 22 July 2024, this Court ordered that “any forthcoming requests for enlargements of time will include a specific statement as to counsel's progress on the case; specifically, the number of transcript pages reviewed to date, and the anticipated date of the completion of any remaining record review.” Order, 22 July 2024. Pursuant to that order, undersigned counsel offers the following, additional information. Due to the delay caused by Mr. Crisp's injury in *Moreno*, undersigned counsel began a review of Appellant's case. Specifically, undersigned counsel has reviewed all non-transcript material in the record, with the exception of one sealed defense sentencing exhibit. This review has resulted in the identification of at least two errors. In

Appellant's Motion for Enlargement of Time (Eleventh), undersigned counsel proffered that a complete review of Appellant's case would be accomplished before 30 November 2024. This remains true.

While undersigned counsel has not completed a review of Appellant's case, he has been diligently working other matters. Since Appellant's Motion for Enlargement of Time (Eleventh), undersigned counsel drafted and filed a brief to the CAAF in *United States v. Valentin-Andino*. This included substantial legislative history research on a novel question of statutory interpretation specified by the CAAF. Undersigned counsel also filed a reply brief in *United States v. Kelnhofer*. In addition, undersigned counsel reviewed draft peer filings in five cases, spanning nearly 100 pages and 10 issues. Undersigned counsel also completed research for three issues identified in *United States v. Moreno*. Further, undersigned counsel took several days of leave to judge an undergraduate moot court tournament at his alma mater. Undersigned counsel is also currently attending the four-day Appellate Judges Education Institute 2024 Summit in Boston, Massachusetts.

This Court has also ordered that "any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances." Order, 22 July 2024. The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant's case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant's case or that require review at the CAAF. For example, approximately one week after the instant case was docketed, the CAAF granted review in *United*

States v. Smith. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel* and *United States v. Daughma*—significantly older cases than Appellant’s. Moreover, since the docketing of this case, undersigned counsel has reviewed 20 records of trial for cases older than Appellant’s case.¹ These records contained 12,767 transcript pages. Undersigned counsel has filed 14 briefs before this Court, not including three substantive motions. In addition, undersigned counsel has filed eight briefs before the CAAF (to include six supplements and three briefs on the merits). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and this Court in *Daughma*. Next month, undersigned counsel will also begin preparation for oral argument in *Valentin-Andino*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court’s broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel’s limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant’s case. However, no such substitute counsel has been identified due to the Appellate Defense Division’s workload. Though subject to manual counting, as of 27 September 2024, the Division’s records

¹ This includes *United States v. Beyer* which, although not a case older than Appellant’s, required an earlier review because civilian co-counsel was prepared to file an assignment of errors brief. *See, e.g.*, Article 70(c), UCMJ.

reflect 117 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the thirteen fewer cases now reflect fifty-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-two percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 141 cases eligible for direct appeal forwarded to the Division’s counsel versus 195 automatic appeals over that same time; (2) the Division’s robust practice before the CAAF during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military services heading into the October 2024 term with eight cases—only one fewer than all other services combined—granted review with briefing ordered so far; (3) the high volume of top-priority interlocutory appeals spread amongst the Division’s counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division’s counsel.

Division leadership has worked to mitigate the impact of these cases on the Division’s total workload and its impact on timely resolution of each appellant’s case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel’s parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division’s active duty staffing steady at previously existing levels.

Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

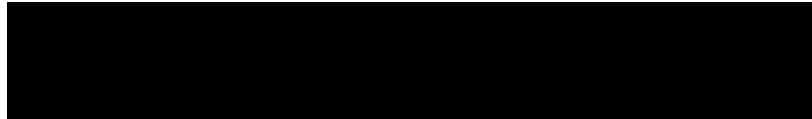
Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned counsel's review of his case; specifically, Appellant understands the delay issues inherent in *Moreno*, and that undersigned counsel will turn to complete that case before finishing his.² Appellant has

² Appellant consents to this limited disclosure of an attorney-client confidential communication.

provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 15 November 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

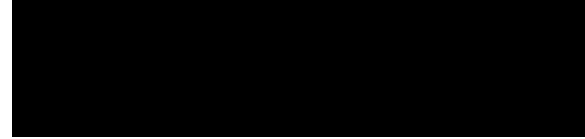
UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed more than two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

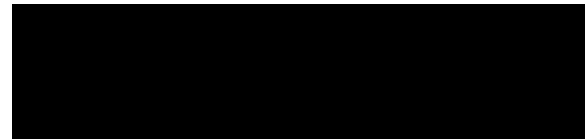
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 18 November 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 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

On 22 November 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Material, specifically Appellate Exhibit XL which consists of medical notes used to refresh a witness’s recollection during Appellant’s court-martial. The requested item was reviewed by trial and defense counsel at Appellant’s court-martial. The United States consented to Appellant’s motion.

Appellate defense counsel argues it is necessary to review the entire record, including the sealed materials to “be in a position to advocate competently on behalf of Appellant.”

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).

The court finds Appellant’s counsel has made a colorable showing that review of the sealed materials is reasonably necessary to fulfill counsel’s duties of representation to Appellant. This court’s order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 26th day of November, 2024,

ORDERED:

Appellant’s Consent Motion to Examine Sealed Material is **GRANTED**.

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibit XL**, subject to the following conditions:

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

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	CONSENT MOTION TO
<i>Appellee</i>	)	EXAMINE SEALED MATERIAL
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	22 November 2024
<i>Appellant</i>)	

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

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

- 1) **Appellate Exhibit XL.** This exhibit contains the medical notes taken by Dr. Yadira Baez-Lockard, a forensic psychologist who testified during pre-sentencing for the Defense. R. at 1065-66. The notes were used to refresh Dr. Baez-Lockard’s memory during testimony. R. at 1065-67. The notes were reviewed by both parties. R. at 1066. The military judge ordered the exhibit sealed. R. at 1084.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels’ responsibilities, undersigned counsel asserts that review of the referenced exhibit is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. The Appellant’s pre-sentencing case at trial was based, in part, on the testimony of Dr. Baez-Lockard. This exhibit was used to refresh Dr. Baez-Lockard’s memory during cross-examination. In order to fully present matters to this Court, the undersigned counsel requires access to sealed material.

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

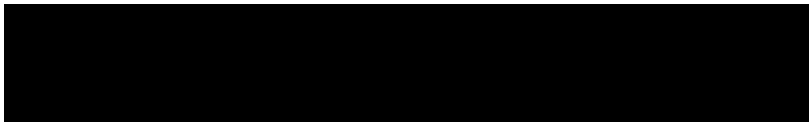
Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

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

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

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

Respectfully submitted,



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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 22 November 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	BRIEF ON BEHALF OF
<i>Appellee,</i>	)	APPELLANT
)	
v.	)	Before Panel No. 3
)	
Airman Basic (E-1)	)	No. ACM 40523
SINCERE GIBBS,)	
United States Air Force,	)	9 December 2024
<i>Appellant.</i>)	

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

ASSIGNMENTS OF ERROR

I.

Whether the military judge erred by granting the Government’s implied bias challenge to a court member based solely on the fact that the member was acquitted of court-martial charges.

II.

Whether Airman Basic Gibbs’s conviction under Article 115, UCMJ, is legally and factually sufficient.

III.

Whether Airman Basic Gibbs’s conviction under Article 130, UCMJ, is legally and factually sufficient.

IV.

Whether the military judge plainly erred by admitting an improper victim impact statement without affording either side an opportunity to object.

V.

Whether this court deprived Airman Basic Gibbs his right to effective appellate counsel by denying Airman Basic Gibbs’s motion for an enlargement of time.

STATEMENT OF THE CASE

A panel of officer and enlisted members sitting as a general court-martial convicted Airman Basic (AB) Sincere Gibbs, contrary to his pleas, of three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ),¹ one charge and specification of communicating a threat, in violation of Article 115, UCMJ, and one charge and specification of stalking, in violation of Article 130, UCMJ. R. at 1037-38. The military judge sentenced AB Gibbs to two years of confinement and a bad-conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

STATEMENT OF FACTS

AB Gibbs grew up in West Philadelphia. R. at 1070-71. West Philadelphia is a dangerous place with gun violence, drugs, and fights. R. at 1071. But AB Gibbs avoided this criminal activity throughout his childhood, instead excelling in sports. R. at 1071. While AB Gibbs had achieved scholarships to college for his athletic abilities, he decided to join the Air Force “to make [his] dreams and goals come true.” R. at 1071.

AB Gibbs met MR—the complaining witness in his court-martial—at technical school for security forces. R. at 315-16. Before graduating technical school, AB Gibbs and MR began dating. R. at 316. In the beginning, the relationship was “good,” “new,” “fun,” and “exciting.” R. at 317.

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

However, things changed after AB Gibbs was stabbed. R. at 319, 327. The injury from the stabbing was severe. Def. Ex. A. It was a “through and through wound,” meaning the knife entered his wrist on one side and exited the other side. R. at 544-45. After the stabbing, AB Gibbs was afraid and had issues trusting people, which required therapy. R. at 1071. At the time of his court-martial, AB Gibbs’s hand felt weak constantly. R. at 1071. As an athlete this was demoralizing because it limited his ability to workout. R. at 1071-72.

According to MR, the stabbing also changed their relationship. R. at 327. AB Gibbs “wasn’t as present . . . mentally.” R. at 327. Eventually this turned into anger because AB Gibbs could not do the things he used to be able to do. R. at 327. Some of this anger was directed at MR because AB Gibbs partially blamed MR for the stabbing. R. at 327-28. MR was apparently friends with the person who stabbed AB Gibbs. R. at 328, 331.

The relationship continued to worsen after MR heard rumors AB Gibbs had been cheating on her. R. at 319. This was only worsened when MR deployed. R. at 360-61. When MR returned from deployment, she believed AB Gibbs was being controlling about who she could hang out with. R. at 365. Eventually, MR began to hang out with DDA, who later became her husband. R. at 368, 372, 649. At about the same time, MR ended her relationship with AB Gibbs. R. at 367.

Additional facts necessary for the resolution of specific issues raised are provided below.

ARGUMENT

I.

The military judge erred by granting the Government's implied bias challenge to a court member based solely on the fact that the member was acquitted of court-martial charges.

A. Additional Facts

RF, a person of color, R. at 288, was in the venire for AB Gibbs's court-martial. R. at 93. After group voir dire, he was selected for individual questioning. R. at 209. During questioning, RF disclosed he was previously charged with (1) communicating a threat and (2) assault with force likely to cause grievous bodily harm. R. at 209-10. RF was acquitted of all charges in early 2020. R. at 211. RF was open and candid, disclosing that he got into a fight with another Air Force member when that person refused to put on a seatbelt in RF's car. R. at 210. RF also stated that he testified at his court-martial. R. at 231.

During questioning from trial counsel, RF stated that he did not think he would align himself more with "the defense table." R. at 214. This is because he did not see the cases as related. R. at 214. When further pressed by trial counsel, RF stated that he believed his court-martial was "fair" and that "due process was done." R. at 215. Because of this, RF did not believe he would be "hypercritical" of the Government's case. R. at 215. RF said he would "decide the case based solely on the evidence . . . and the instructions that the judge gives." R. at 215. When asked if there was any hesitation about that or doubt in his mind, RF declared "none." R. at 215.

During questioning by trial defense counsel, RF said he did not hold anything against the Air Force, Government counsel, or the Office of Special Investigations (OSI). R. at 216. While he did admit to feeling "slighted" during his court-martial, those feelings were not "long lasting," and he understood the Government was just doing its job. R. at 216. When asked by trial defense

counsel if he would hold AB Gibbs to a different standard because he testified in his trial, RF said “no.” R. at 217. In fact, he indicated during group voir dire that there are many reasons someone may choose not to testify in their own defense. *See e.g.*, R. at 141. The military judge had no follow-up questions.

After questioning, the Government challenged RF for implied bias. R. at 262-63. In his ruling, the military judge found that RF was candid in his answers. R. at 264. The military judge further found that RF had no actual bias. R. at 265. Nevertheless, the military judge did not think “an objective observer would find him to be impartial” because he had “been court-martialed by the Air Force” three years prior. R. at 265. When challenged by trial defense counsel that this ruling meant no prior accused—even when acquitted—could serve on any panel, the military judge agreed. R. at 265-66. The military judge went further, articulating that those prosecuted by the Air Force “would feel some kind of hard feelings toward the Air Force” and objective observers would not believe they could be impartial. R. at 266.

After challenges for-cause, the Government moved to peremptorily challenge the last remaining person of color from the panel. R. at 281-82, 288. AB Gibbs demanded the Government proffer a race neutral reason for the challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). R. at 281. The military judge ruled that the Government’s purported race neutral reason was inadequate and denied the peremptory challenge.

B. Standard of Review

”Because the test for implied bias is an objective one . . . courts ‘review implied bias challenges pursuant to a standard that is “less deferential than abuse of discretion, but more deferential than de novo review.”’” *United States v. Keago*, 84 M.J. 367, 372 (C.A.A.F. 2024) (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015) (quoting *United States v.*

Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006))). This is a “sliding standard of appellate review.” *Id.* at 373. “A military judge who cites the correct law and explains his implied bias reasoning on the record will receive greater deference.” *Id.* Ultimately, “the more reasoning military judges provide, the more deference they will receive.” *Id.*

C. Law and Analysis

The military judge erred by excusing RF for implied bias. The test for implied bias is “whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.” *Id.* at 372 (quoting *United States v. Woods*, 74 M.J. 238, 243-44 (C.A.A.F. 2015)). In answering this question, courts should consider “the totality of the circumstances, and assume the public is familiar with the unique structure of the military justice system.” *Id.*

This Court should review the military judge’s decision to grant the Government’s challenge de novo. Like in *Keago*, the military judge “began his ruling . . . on strong ground” by summarizing the correct law. *Id.* at 373. However, the military judge provided little—if any—actual analysis as to why he believed there was a risk to the public’s perception. *Id.* at 372. In fact, the military judge’s analysis was limited to the following: “But I do have concerns about public perception and understanding that the standard is when most people in his position, who had been court-martialed by the Air Force, even though they were acquitted, in that position would probably not feel the same way that he does.” R. at 265. Ultimately, like in *Keago*, the military judge failed to provide “analysis as to why, given the specific factors in this case, the

balance tipped in favor of [granting] the challenge.” *Id.* Therefore, a de novo review is appropriate.²

The military judge in this case erred by granting the challenge for cause. The military judge found that RF was not actually biased. R. at 265. But he concluded that “an outside observer . . . would think . . . implied bias exists when most people in the same position . . . would be prejudiced.” There are multiple problems with this analysis. First, it is not the correct test. The correct test is whether there is “too high” of a risk that an outside observer will perceive that there is something less than fair, impartial court members. *Keago*, 84 M.J. at 372. Second, despite being pressed by trial defense counsel, the military judge did not provide analysis on the record for why he believed an acquitted person would always be impliedly biased. In fact, the evidence before the military judge was the opposite: acquitted persons can be fair and impartial. R. at 209-17.

The correct test demonstrates there was no risk that outside members of the public would perceive anything less than fair and impartial member, let alone “too high” of a risk. RF withstood cross examination from trial counsel during individual voir dire. He stated that he would not align himself more with the defense. R. at 214. He averred that his own trial was “fair” and that “due process was done.” R. at 215. And he did not believe he would be “hypercritical” of the Government’s case. R. at 215. Ultimately, RF did not hold anything against the Air Force for his prosecution. R. at 216. Most importantly, RF said he would “decide the case based solely on the evidence . . . and the instructions that the judge gives.” R. at 215. These answers—which the military judge found to be candid— indicate a member with no bias or prejudice against either

² For the reasons articulated below, even if this Court were to afford this military judge more deference, this Court should nevertheless find that the military judge erred.

side. This belies the notion that the public, if informed of his responses, would conclude that he would be less than fair and impartial.

Instead of focusing on the facts before him, the military judge made a blanket ruling: “I think it’s pretty fair to say that most people, whether they are acquitted or not, the fact that they’ve been prosecuted by the Air Force[,] would feel some kind of hard feelings toward the Air Force.” R. at 266. But RF had no such feelings toward the Air Force, and the military judge gave no analysis on the record to his mitigating responses. R. at 209-17. However, these responses showed that RF was fair and impartial, and his excusal was wholly inappropriate.

Making matters worse, the military judge did not tie his ruling to the specific facts of RF’s case. This is likely because the facts were too dissimilar to yield any meaningful analysis in support of the military judge’s conclusion, and RF did not view AB Gibbs’s court-martial as similar to his own. R. at 214. This is unlike *United States v. Williams*, where the Navy-Marine Corps Court of Criminal Appeals (Navy-Marine Court) upheld a military judge’s decision to exclude a court member over defense objection. NMCCA 201200248, 2013 CCA LEXIS 354, at *14-16 (N-M. Ct. Crim. App. Apr. 30, 2013). In that case, the member’s aunt was tried and acquitted of murder using a theory of self-defense. *Id.* at *15-16. The aunt’s trial had a “significant impact” on the court member and also shaped how the court member viewed self-defense. *Id.* at *15-16. Because the *Williams* trial involved a theory of self-defense, the Navy-Marine Court held excusal was appropriate. *Id.* at *15-16. In this case, the facts of RF’s case were distinct—RF’s case was not a domestic dispute and involved mutual combat, where AB Gibbs’s case is did involve a domestic dispute and no claims of mutual combat.

In dismissing an appellant’s implied bias challenge on appeal, this Court noted that “a member of the public, including one who had been forcibly raped, would want a court-martial to

convict the guilty and acquit the innocent.” *United States v. Casillas*, No. ACM 40302, 2023 CCA LEXIS 527, at *14 (A.F. Ct. Crim. App. Dec. 15, 2023), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 329 (C.A.A.F. 2024). This Court should afford acquitted persons at least the same latitude it is willing to extend to purported victims and their families. In this case, the military judge dismissed an acquitted servicemember for implied bias with little, if any, rationale on the record. As such, his decision should be afforded little deference and this Court should find that RF was not impliedly biased. Therefore, this Court should set aside the findings and sentence.

II.

Airman Basic Gibbs’s conviction under Article 115, UCMJ, is legally and factually insufficient.

A. Additional Facts

After breaking up with AB Gibbs, MR continued to have regular contact with him. R. 369. During one of their conversations, AB Gibbs was drunk. R. at 370. He was “slurring his words” and speaking in a “mellow tone.” R. at 370. He was also extremely emotional, “crying, sobbing.” R. at 370. During the conversation, AB Gibbs implied he was going to kill himself. R. at 369. AB Gibbs had firearms in his home, and this worried MR. R. at 365. MR told AB Gibbs she would go to his place and comfort him. R. at 369. However, on the drive to his place, MR began to believe AB Gibbs was being manipulative; she told him “I don’t believe you” and “I’m not coming.” R. at 370. MR hung up the phone. R. at 370. AB Gibbs called back and he “was really, really sad and upset, and he was crying.” R. at 370. Through his tears he told MR “Bitch, I’ll kill you.” R. at 370. Immediately after, AB Gibbs began sobbing. R. at 370. He instantly apologized and told MR that he “didn’t mean it.” R. at 370. MR hung up the phone. R. at 370.

B. Standard of Review

This Court reviews legal and factual sufficiency questions de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (CMA 1990)).

C. Law and Analysis

AB Gibbs's conviction under Article 115, UCMJ, is legally and factually insufficient for two reasons. First, the Government did not satisfy the first element because it failed to prove that AB Gibbs communicated language that a reasonable person would view as a threat. Second, the Government did not satisfy the third element because it failed to prove that AB Gibbs intended his words to be understood as sincere.

This Court may affirm only such findings that are "correct in law and fact." Article 66(d), UCMJ. "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) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

Factual sufficiency requires this Court to determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [the Court] are themselves convinced of the accused's guilt beyond a reasonable doubt."³ *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citation omitted). A review

³ AB Gibbs recognizes that Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B), has been amended. See *United States v. Harvey*, ___ M.J. ___, 2024 CAAF LEXIS 502, at *6-10 (C.A.A.F. 2024). However, these amendments do not change the factual sufficiency standard. *Id.* at *10 ("We do not read the phrase 'weight of the evidence' as an alteration of the necessary quantum of proof to sustain a finding of guilty."), *12 ("Appellant argues that th[e] phrase ['clearly convinced'] does not change the necessary quantum of proof. . . . We agree.").

for factual sufficiency “involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses.” *Washington*, 57 M.J. at 399. This is an “impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own 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) (cleaned up). This Court has the power to “judge the credibility of witnesses, determine controverted questions of fact . . . and substitute its judgment for that of the military judge.” *Cole*, 31 M.J. at 272.

1. AB Gibbs’s conviction is legally and factually insufficient because the Government failed to prove that an objective, reasonable person in MR’s position would view AB Gibbs’s communication as a threat.

Article 115, UCMJ, has three elements. *MCM*, Part IV, ¶ 53(b)(1). The first element is that the appellant “communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future.” *MCM*, Part IV, ¶ 53(b)(1)(a); see *United States v. Myers*, No. ACM S32749, 2024 CCA LEXIS 347, at *9 (A.F. Ct. Crim. App. Aug. 22, 2024), *rev. granted*, Order Granting Review, dated 4 December 2024 (pending publication). “The first element of communicating a threat requires an objective inquiry.” *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023). This inquiry analyzes the existence of the threat from the viewpoint of a “reasonable person in the recipient’s place.” *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995).

Here, the Government failed to prove that a reasonable person would view AB Gibbs’s communication as a threat. Context is important for this analysis. *Harrington*, 83 M.J. at 414 (reasoning that the first element should be viewed from the “recipient’s place”). In *Harrington*,

the CAAF relied on the appellant's sincerity showing that an objective, reasonable person would view the communication as a threat. *Id.* For example, after making the threat, the appellant in that case stated, "I'm fucking dead ass serious." *Id.* (cleaned up). Here, AB Gibbs did not have the same type of sincerity. In fact, immediately following the communication, AB Gibbs profusely apologized and said he "didn't mean it." R. at 370.

This is further supported by AB Gibbs's mental and emotional state at the time he made the communication. During both phone calls, AB Gibbs was extremely upset. R. at 369-70. He was sobbing on the phone. R. at 370. He had a mellow tone. R. at 370. AB Gibbs was so emotional he intimated he was going to kill himself. R. at 369-70. MR recognized how upset he was, which is why she agreed to go to his place. R. at 370. On top of his emotional state, AB Gibbs was so intoxicated that MR could hear him slurring his words during the short phone call. R. at 369-70. These facts—which an objective listener in MR's position would have known—demonstrate that any communication from AB Gibbs was not legitimate given his emotional and mental state.

Moreover, a recipient's "reaction to the alleged threat provides useful context" for what a reasonable person would believe. *Harrington*, 83 M.J. at 415; *United States v. Pittman*, No. ACM 40298, 2024 CCA LEXIS 145, at *18 (A.F. Ct. Crim. App. Apr. 22, 2024). In this case, MR did not testify that she was afraid of the communication. Instead, she said she was "terrified, because [AB Gibbs's] emotions were changing." R. at 370. This is distinct from fear created by the threat itself.

Context is important for determining whether a communication caused a reasonable person to believe there was a threat. In this case, the circumstances demonstrate that the communication was not a threat. Therefore, no rational factfinder could have found, beyond a reasonable doubt, that an objective person would view the communication as threat. Should this

Court disagree, this Court should not, itself, be convinced beyond a reasonable doubt that the communication was a threat.

2. AB Gibbs's conviction is legally and factually insufficient because the Government failed to prove that AB Gibbs intended his words to be understood as sincere.

The third element under Article 115, UCMJ, is that "the communication is wrongful." MCM, Part IV, ¶ 53(b)(1)(c). "In contrast to the first element, the third element's requirement of wrongfulness is properly understood in relation to the subjective intent of the speaker." *Harrington*, 83 M.J. at 414. Under this element, the Government must prove that the speaker "intended his . . . words *to be understood as sincere*." *Id.* (quoting *United States v. Rapert*, 75 M.J. 164, 169 n.10 (C.A.A.F. 2016)) (emphasis in original).

In this case, there is no evidence that AB Gibbs intended his words to be understood as sincere. Akin to *Harrington*, the lack of evidence supporting the first element demonstrates a lack of support for the third. *Cf. id.* at 415 ("Much of the evidence supporting the panel members' determination that the texts were objectively threatening also supports this conclusion."). But, unlike *Harrington*, there was no evidence of contemporaneous menacing actions in this case. For example, the appellant in *Harrington* brandished a firearm following the communication. *Id.* at 415. Here, not only did AB Gibbs never brandish a firearm, he also immediately and profusely apologized for the communication. After all, there is very little that is menacing about a sobbing, drunk, suicidal teenager who says "[I] didn't mean it." AB Gibbs's emotional and mental state at the time of the communication should give this Court pause.

Even if AB Gibbs was not emotionally and mentally distraught at the time of the communication, he clearly did not intend for the communication to be understood as sincere. This is evident from his immediate and profuse apology to MR, which directly followed the communication. This is distinct from *United States v. Pittman*, where the appellant was upset

about an apparent sexual assault and communicated a threat to the abuser by brandishing a firearm. No. ACM 40298, 2024 CCA LEXIS 145, at *25-26. While this Court reasoned that the appellant's actions were made in the heat of passion, the appellant still intended to communicate the threat despite his mental state. *Id.* But, what makes *Pittman* distinct is that the appellant did not immediately apologize and say, "I didn't mean it." Here, that is exactly what happened, which demonstrates AB Gibbs did not have any such intent. Therefore, no rational trier of fact could have found, beyond a reasonable doubt, that AB Gibbs had the intent to communicate a sincere threat. And this Court itself should not be convinced beyond a reasonable doubt that AB Gibbs had the requisite intent. This Court should set aside the findings and sentence as to this charge and its specification.

III.

Airman Basic Gibbs's conviction under Article 130, UCMJ, is legally and factually sufficient.

A. Additional Facts

The Government charged AB Gibbs with a violation of Article 130—Stalking. Charge Sheet at 3. In relevant part, the Government alleged that AB Gibbs "engage[d] in a course of conduct directed at [MR], that would cause a reasonable person to fear bodily harm, to wit: physical harm, to herself, by harassing and threatening her." Charge Sheet at 3. There was no additional specificity provided by the Government in the Charge Sheet.

Because of this, it is not clear what evidence was used to prove this charge.⁴ However, the record provides some indication of the facts that the Government thought constituted the stalking. First, communications between MR and AB Gibbs in the form of text messages. R. at 993-97;

⁴ This is made more complicated because trial defense counsel did not request a bill of particulars for "strategic" reasons. R. at 428.

Pros. Exs. 2-4. Second, purported communications from AB Gibbs from unknown phone numbers or social media accounts. *See, e.g.*, R. at 998 (arguing about communications occurring after MR blocked AB Gibbs’s phone number); *see also* Pros. Ex. 5; Pros. Exs. 11-12; Pros. Exs. 14-15. Third, apparent incidents where AB Gibbs was in the same general location as MR after the imposition of a no contact order.⁵ *Compare* R. at 48, *with* App. Ex. VIII at 4; *see* R. at 1001. Fourth, an incident where MR alleges AB Gibbs threw rocks at the window of DDA’s apartment. R. at 41; R. at 1001. Fifth, an incident where MR’s tires were slashed. R. at 45-46. And, last, an incident on 4 July 2021 where an unknown driver erratically followed a car MR was a passenger in. *Compare* R. at 47, *with* App. Ex. VI at 3.

B. Standard of Review

This Court reviews legal and factual sufficiency questions de novo. *Washington*, 57 M.J. at 399.

C. Law and Analysis

The Government did not prove, beyond a reasonable doubt, that AB Gibbs committed the underlying facts of the Article 130, UCMJ, offense. Because of this, AB Gibbs’s conviction for stalking is legally and factually insufficient.

1. Aside from certain text messages received by MR from AB Gibbs’s phone number, the Government failed to prove any of the alleged incidents beyond a reasonable doubt.

First, the Government failed to prove that AB Gibbs was driving—or even a passenger in—the car that allegedly followed MR’s vehicle on 4 July 2021. On 4 July 2021, MR was a passenger in a car driven by DDA. R. at 371, 667. LH was also in the car. R. 667. MR alleged

⁵ AB Gibbs and MR lived in the same apartment complex during some of the charged timeframe. *Compare* Charge Sheet, *with* R. at 419. MR also spent significant time at an adjoining apartment complex. *See, e.g.*, Pros. Ex. 7.

that AB Gibbs “pulled up behind us . . . in a car.” However, MR never saw AB Gibbs in the car, nor did she recognize the car that was following them. R. at 371. The Government also called DDA and LH as witnesses. Neither DDA nor LH saw AB Gibbs driving the car, nor did they see AB Gibbs in the car as a passenger. R. at 668-69, 901.

Second, the Government failed to prove that AB Gibbs sent text messages and made phone calls to MR from an unknown or manufactured phone number. MR alleged that AB Gibbs sent text messages from an unknown or manufactured number. R. at 392, 409. But the Government did not have any digital forensic analysis done to demonstrate that AB Gibbs sent these messages. Further, while MR guessed AB Gibbs sent the messages because he used a nickname for DDA that others in their unit used, R. at 392-93, she never spoke to him on the phone or otherwise identified his voice. R. at 409. MR further alleged that AB Gibbs called her from “No Caller Identification.” R. at 454; Pros. Ex. 11. However, this was based purely on MR’s speculation. The Government never conducted any forensic analysis to determine the origin of the caller.

Third, the Government failed to prove that AB Gibbs threw rocks at DDA’s apartment window. MR claimed that, while staying at DDA’s apartment, AB Gibbs threw rocks at a window. R. at 437. However, MR did not actually see AB Gibbs throw the rocks. *Cf.* R. 437 (testifying that she saw rocks that were allegedly thrown and AB Gibbs on the ground floor). DDA also did not see AB Gibbs throw any rocks. R. at 672. Further, even if the Government could prove that AB Gibbs threw the rocks, it did not prove that he knew MR was at DDA’s apartment the night he threw the rocks.

Fourth, the Government failed to prove that, after the issuance of the no contact order, AB Gibbs’s knowingly placed himself in MR’s vicinity. The Government was required to prove that AB Gibbs knew, or should have known, that MR would be placed in fear by his actions. *MCM*,

Part IV, ¶ 80(b). This is problematic in this case because many of the purported incidents where AB Gibbs was in MR's vicinity occurred at either AB Gibbs's apartment complex (The Wyatt), R. at 361, or at an adjacent apartment complex (North Highlands). Pros. Ex. 7. For example, during one alleged incident, MR went to the leasing office and saw AB Gibbs. R. at 441-42. During another alleged incident, AB Gibbs was on a run when he passed MR in her car. R. at 444. The Government did not prove beyond a reasonable that AB Gibbs had the requisite knowledge during these and similar incidents when he was in and around his apartment complex, or the apartment complex adjacent to his.

Fifth, the Government failed to prove that AB Gibbs's slashed MR's tires. MR alleged that her tires were slashed and that a note was left on her car. R. at 410-11. The note said, "Stay away from the Highlands and stay away from my man, respectfully." R. at 411; Pros. Ex. 6. MR speculated AB Gibbs slashed her tire and left the note, but did not know for sure. R. at 414-15. There was an eyewitness to the slashing, but that witness did not identify AB Gibbs out of a photo lineup. R. at 895. The Government called no witness that identified AB Gibbs. Further, the Government did not have a handwriting expert analyze the handwritten note.

Aside from the text messages, discussed below, the Government failed put on evidence of the stalking offense. Therefore, AB Gibbs's conviction for stalking is legally and factually insufficient.

2. The text messages alone are insufficient to sustain a conviction under Article 130, UCMJ.

The Government failed to prove that AB Gibbs engaged in a course of conduct, directed at MR, which would cause a reasonable person to fear bodily harm. *MCM*, Part IV, ¶ 80(b); Charge Sheet at 3. Even assuming the Government proved that AB Gibbs sent MR the text

messages in Pros. Exs. 2-4, they are insufficient to demonstrate that AB Gibbs engaged in the requisite course of conduct.

“‘Course of conduct’ means ‘a repeated maintenance of visual or physical proximity . . . or a repeated conveyance of verbal threat, written threats, or threats implied by conduct.’” *United States v. Kirkpatrick*, ARMY 20100716, 2013 CCA LEXIS 41, at *4 (A. Ct. Crim. App. Jan. 31, 2013) (citing the 2008 *MCM*); *MCM*, Part IV, ¶ 80.a.(b). In *Kirkpatrick*, the Army Court of Criminal Appeals (Army Court) reasoned that a series of text messages—along with visiting the victim in person—was insufficient to establish the requisite course of conduct. *Id.* This was so even though the victim did not respond to any of the text messages sent by the appellant. *Id.* Here, the only evidence of a course of conduct is the text messages.⁶ While the messages in this case span several days, which is distinct from *Kirkpatrick, id.*, MR responded to these messages. Pros. Exs. 2-4. This not only demonstrates that AB Gibbs did not engage in the requisite course of conduct, but also that MR was not placed in actual fear, negating the third element. *MCM*, Part IV, ¶ 80(b).

Moreover, nothing in Prosecution Exhibits 2-4 convey a threat to MR. While these messages may demonstrate a young man struggling to cope with the loss of a partner he clearly loved, they do not demonstrate threats to harm or kill. Pros. Exs. 2-4. MR seemed to recognize this when responding to AB Gibbs in the text messages: “Stop trying to love me.” Pros. Ex. 4 at 2. This is distinct from *United States v. Spinoza*, where the appellant sent “text messages threatening to break [the victim’s] window, and to break into her home and kill whomever she was with.” No. 201700236, 2019 CCA LEXIS 40, at *11 (N-M. Ct. Crim. App. Feb. 4, 2019).

⁶ This is because, as discussed above, the Government failed to prove the remaining pieces of evidence making-up this charge.

While AB Gibbs appears persistent in his text messages, MR is engaged in the conversation too. Pros. Exs. 2-4. This is not a situation where an accused sent countless messages to a victim without response. Instead, MR was willingly engaged with AB Gibbs, at times even prompting additional responses from him. Pros. Exs. 2-4. Therefore, the Government failed to prove that AB Gibbs stalked MR, and AB Gibbs's conviction for stalking is legally and factually insufficient. This Court should set aside the findings and sentence as to this charge and its specification.

IV.

The military judge plainly erred by admitting an improper victim impact statement without affording either side an opportunity to object.

A. Additional Facts

During pre-sentencing, MR offered a victim impact statement. R. at 1050; Court Exhibit A. The military judge asked trial defense counsel if they "had an opportunity to review" the victim impact statement. R. at 1051. Trial defense counsel said that they had reviewed the exhibit. R. at 1051. After receiving Court Exhibit A, the military judge did not ask either the Government or the defense if they objected to Court Exhibit A.

In Court Exhibit A, MR stated that she was "petrified thinking about what happens after sentencing." Ct. Ex. A at 1. She averred that she worried "sick for the children [she had] yet to birth, and the next women [AB Gibbs] comes into contact with." Ct. Ex. A at 1. MR went further, informing the court that AB Gibbs "would often see the devil in his dreams." Ct. Ex. A at 1. MR also averred that she was strangled three times by AB Gibbs. Ct. Ex. A at 1. AB Gibbs was convicted of only two strangulation specifications. *Compare* R. at 1037, *with* Charge Sheet at 1, 3.

B. Standard of Review

The application of R.C.M. 1001(c) is a question of law this Court reviews de novo. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022). When an appellant does not raise an issue at trial, this Court reviews a military judge’s decision to admit evidence for plain error. *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022). Under plain error, an appellant must show: (1) that there was error; (2) that the error was clear and obvious; and (3) that the error results in material prejudice to the appellant’s substantial rights. *Id.*

C. Law and Analysis

The military judge plainly erred by admitting Court Exhibit A because it contained improper victim impact. This error was clear and obvious and resulted in material prejudice.

Court Exhibit A contained at least three types of improper victim impact: (1) that AB Gibbs committed an offense he was not found guilty of; (2) that AB Gibbs “would often see the devil in his dreams;” and (3) that MR worried about her unborn children and AB Gibbs’s future “women.”

First, stating that AB Gibbs committed three acts of strangulation—when he was only convicted of two—was outside the scope of appropriate victim impact. R.C.M. 1001(c)(2)(B) provides that “victim impact includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty.” Here, MR’s comment that AB Gibbs committed three acts of strangulation was outside the scope of R.C.M. 1001(c)(2)(B). *United States v. Arroyo*, No. ACM 40321 (f rev), 2024 CCA LEXIS 242, at *12 (A.F. Ct. Crim. App. Jun. 18, 2024), *rev. granted* __ M.J. __, 2024 CAAF LEXIS 592 (C.A.A.F. 2024). Similarly, claiming that AB Gibbs often saw the devil in his dreams is far outside of R.C.M. 1001(c)(2)(B)’s scope because it is unrelated to the offenses he was

convicted of. Rather than expressing an impact directly resulting from the offenses, MR's statement here achieved nothing more than painting AB Gibbs as a bad—and potentially demonically possessed—person undeserving of leniency.

Moreover, MR's worry about her hypothetical future children—as well as hypothetical future women in AB Gibbs's life—is too far removed from the charged misconduct to fall under R.C.M. 1001(c). Victim impact “does not allow ‘a never-ending chain of cause and effects’ to be relayed to the sentencing authority.” *United States v. King*, No. ACM 39583, 2021 CCA LEXIS 415, at *136 (A.F. Ct. Crim. App. Aug. 16, 2021) (citation omitted), *aff'd* 83 M.J. 115 (C.A.A.F. 2021). Here, MR's purely hypothetical future children and unknown women in AB Gibbs's life are part of such a “never-ending” chain. Such evidence is “too far removed in time or type to the convicted offense.” *Arroyo*, 2024 CCA LEXIS 242, at *15.

AB Gibbs was prejudiced by the military judge's error. This Court examines prejudice at sentencing with four factors: “(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Edwards*, 82 M.J. at 247. The first factor weighs in favor of AB Gibbs because the Government's sentencing case was based primarily on victim impact. R. at 1074-76. While the Government introduced adverse information against AB Gibbs in the form of administrative paperwork, Pros. Exs. 22-26, the Government's sentencing argument relied heavily on crime victim impact. R. at 1074-76. The second factor also weighs in AB Gibbs's favor because the defense sentencing case was strong. The defense introduced numerous character letters, Def. Exs. D-I, an unsworn statement, Def. Ex. K., and testimony from their forensic psychologist discussing AB Gibbs's rehabilitative potential. R. at 1053-59. The third and fourth factors also weigh in AB Gibbs's favor. The materiality and quality of Court Exhibit A was strong, which is evident from

the Government's reliance on it throughout their sentencing argument. R. at 1074-76. Moreover, telling the sentencing authority that AB Gibbs routinely sees the devil in his dreams is passionate imagery, invoking images of evil incarnate and demonic possession. While inappropriate, the imagery of such evidence is of strong quality.

Therefore, the military judge plainly erred by admitted Court Exhibit A and this Court should reassess AB Gibbs's sentence.

V.

This Court deprived Airman Basic Gibbs his rights to effective appellate counsel by denying Airman Basic Gibbs's motion for an enlargement of time.

A. Additional Facts

On 15 November 2024, undersigned counsel filed a motion for enlargement of time (EOT) to this Court. In that motion for EOT, undersigned counsel informed this Court that he required an additional thirty days to complete a review of the record, research identified errors, and draft an assignments of error brief. Based on this Court's direction, undersigned counsel also noted several exceptional circumstances that necessitated the delays in the instant case. Moreover, the motion for EOT stated that AB Gibbs consented to the enlargement and was apprised as to the status of undersigned counsel's progress.

This Court denied the motion for EOT. In so doing, this Court emphasized its duty to ensure speedy appellate review. Order, 22 November 2024. Notably, this Court failed to acknowledge its obligation to ensure that criminal appellants receive competent Article 70, UCMJ, representation. Instead, this Court personally chastised undersigned counsel for taking leave and attending temporary duty training. Order, 22 November 2024. Despite working every weekend day, holiday, family day, and while on leave and TDY, this Court declared that

undersigned counsel had a “sanguine” attitude toward purported “protracted delays.” Order, 22 November 2024.

At the time of this Court’s order, undersigned counsel had not completed a review of the entire record. Since the denial, undersigned counsel completed a draft assignments of error brief in an older case than this one, reviewed over 1,000 pages of unreviewed material in this case, identified six errors, researched those errors, and drafted this filing. To do so, undersigned counsel worked approximately 12 hours nearly every day since 22 November 2024. This included weekends, holidays, and family days. Despite long hours and personal sacrifice, undersigned counsel cannot be confident that his representation has been competent. The research necessary for adequate Article 70, UCMJ, representation has not been completed. Further, the time necessary to draft and review this filing was extremely truncated, resulting in sub-par advocacy.

B. Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F 2004).

C. Law

1. Ineffective Assistance of Appellate Counsel

An accused has a right to effective assistance of counsel on appeal. *Id.* “Claims that appellate defense counsel have rendered ineffective assistance are measured by the same test applicable to such claims lodged against a trial defense counsel.” *Id.* (citing *United States v. Hullum*, 15 M.J. 261, 267 (C.M.A. 1983)). As such, this Court is guided by the two-part *Strickland* test: deficient performance and prejudice. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). “An appellant meets his burden on deficient performance when he demonstrates that his appellate counsel's performance was so deficient that it fell below an objective standard of

reasonableness.” *Id.* The second factor “is met when the appellant shows that appellate counsel's errors were so serious as to deprive the appellant of a fair appellate proceeding whose result is reliable.” *Id.* (cleaned up).

2. Appellants’ Rights to Counsel and Briefing under Article 70, UCMJ

In *United States v. Roach*, this Court erroneously held that “lengthy delays . . . do not serve either the interests of the accused or the interests of the Air Force. Therefore, this Court is taking action *sans* a brief [sic] appellate counsel.” 66 M.J. 410, 416 (C.A.A.F. 2008) (quoting *United States v. Roach*, ACM S31143, 2007 CCA LEXIS 402, at *3 (A.F. Ct. Crim. App. Sep. 13, 2007)). This Court then conducted its own review “*sans* a brief,” because it erroneously believed that “if defense counsel did not file a brief, [this Court] could presume the case was submitted on the merits.” *Id.* (citing *Roach*, ACM S31143, 2007 CCA LEXIS 402, at *3). In its review of the case, this Court considered whether appellate defense counsel’s failure to submit a timely brief amounted to ineffective assistance. *Id.* a 416-17.

Unsurprisingly, our superior court reversed. While the CAAF understood this Court’s concerns about timely appeals, *Id.* at 419, it was left unconvinced that this Court could simply decide a case without briefing from Article 70, UCMJ, counsel. *Id.* at 418-19. The CAAF emphasized:

[This Court] may set and enforce deadlines. If [this Court] encounters . . . delays during . . . proceedings, it should consider the methods identified in this opinion to determine the nature of the problem, ensure that Appellant understands the available options, and take appropriate action, including requiring that the Judge Advocate General appoint additional or substitute counsel if necessary.

Id. at 419.

The CAAF has been clear that a CCA’s “independent review is not the same as competent appellate representation. An appellant who is denied counsel is forced to proceed ‘without a

champion on appeal.” *United States v. May*, 47 M.J. 478, 481 (1998) (quoting *Douglas v. California*, 372 U.S. 353, 356 (1963)). And “[d]enial of appellate counsel is presumptively prejudicial. *Id.* (citing *Penon v. Ohio*, 488 U.S. 75, 88 (1988)).

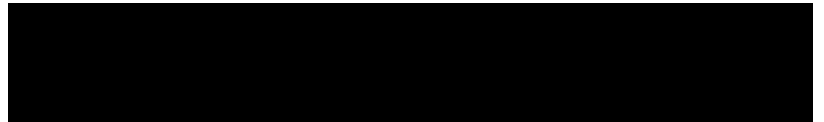
D. Analysis

Undersigned counsel has an obligation to competently and zealously represent his client, AB Gibbs. *Adams*, 59 M.J. at 370; Air Force Instruction 51-110, *Professional Responsibility Program*, Rule 1.1 (Competence); Virginia Rules of Professional Conduct [hereinafter Virginia Rules], Rule 1.1 (Competence); Virginia Rules, Preamble (“As advocate, a lawyer zealously asserts the client's position.”). But, as an attorney and officer in the United States Air Force, he also has an obligation to follow the orders of this Court. This Court’s 22 November 2024 order created a Catch 22, *United States v. Warner*, 62 M.J. 114, 122 n.39 (C.A.A.F. 2005) (“Catch-22 is defined as a ‘problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule.’”), where the undersigned had to choose between competent representation and following an order from this Court. Failing to do either would be professionally unacceptable and, potentially, criminally sanctionable.

In this case, this Court’s order forced a filing before undersigned counsel could competently review the record, complete research, and draft identified errors. While undersigned counsel knows of no specific prejudice arising from his representation, it is likely something was missed. This may become clear when the Government’s answer—or this Court’s opinion—notes the shortcomings of AB Gibbs’s appellate arguments. Moreover, denying AB Gibbs an opportunity for adequate and full representation is inherently prejudicial, as it deprives him of his statutory and constitutional rights to effective assistance on appeal.

This Court's recent fixation on apparent untimely appeals is "laudable." *Cf.* Order, dated 22 November 2024. But, sacrificing competent representation under the guise of speedy appellate review is antithetical to the Constitution, Article 70, UCMJ, the CAAF's precedent, and the interests and desires of AB Gibbs. As such, this Court should set aside AB Gibbs's findings and sentence with prejudice.

Respectfully submitted,

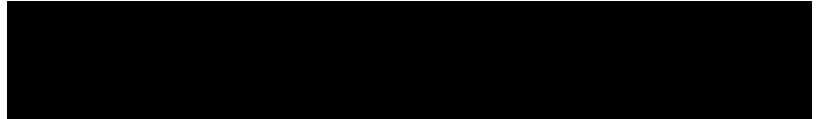


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CERTIFICATE OF FILING AND SERVICE

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 9 December 2024.

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**IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES,)	
<i>Appellee,</i>)	UNITED STATES ANSWER TO
	)	ASSIGNMENTS OF ERROR
v.)	
)	
	)	Before Panel No. 3
Airman Basic (E-1))	
SINCERE N. GIBBS, USAF	)	No. ACM 40523
<i>Appellant.</i>)	
	)	8 January 2025

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	ANSWER TO ASSIGNMENTS OF
<i>Appellee,</i>	)	ERROR
)	
v.	)	Before Panel No. 3
)	
Airman Basic (E-1)	)	No. ACM 40523
SINCERE N. GIBBS)	
United States Air Force	)	8 January 2025
<i>Appellant.</i>)	

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED BY GRANTING THE GOVERNMENT’S IMPLIED BIAS CHALLENGE TO A COURT MEMBER BASED SOLELY ON THE FACT THAT THE MEMBER WAS ACQUITTED OF COURT-MARTIAL CHARGES.

II.

WHETHER [APPELLANT’S] CONVICTION UNDER ARTICLE 115, UCMJ, IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER [APPELLANT’S] CONVICTION UNDER ARTICLE 130, UCMJ, IS LEGALLY AND FACTUALLY SUFFICIENT.

IV.

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ADMITTING AN IMPROPER VICTIM IMPACT STATEMENT WITHOUT AFFORDING EITHER SIDE AN OPPORTUNITY TO OBJECT.

V.

**WHETHER THIS COURT HAS DEPRIVED [APPELLANT]
[OF] HIS RIGHT TO EFFECTIVE APPELLATE COUNSEL
BY DENYING [APPELLANT'S] MOTION FOR AN
ENLARGEMENT OF TIME.**

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant and MR, the victim in this case, began dating in 2019. (R. at 316). In 2020, after only dating Appellant for around five months, MR was told by her friends that Appellant was cheating on her, and so she tried to break off the relationship. (R. at 319, 324). Appellant became angry. He was yelling, pacing, slapping his hands, and throwing his hands up. (R. at 319-320). He grabbed MR by the neck, strangling her to the point she could not breathe as he pushed her back. (R. at 320, 322). After the assault, MR was too scared to break up with Appellant. (R. at 324). She felt trapped. She felt like she couldn't ever leave. (Id.)

Appellant was stabbed by another airman around February of 2020. (R. at 326). After he was stabbed, he became more aggressive. (R. at 327). Appellant and MR would often argue. (R. at 328, 350).

Around May 2020, Appellant and MR were arguing in his dorm room. (R. at 350). He became very upset and flipped his desk. He was crying and yelling, slapping his hands, and waiving his arms. He grabbed MR by the neck and held her to the bed. (Id.)

On another day, MR was angry with Appellant because she was still hearing that he was cheating. She called Appellant a pussy for being stabbed. (R. at 331). Later, Appellant called MR and asked to talk. (R. at 330). At first, she said no because she was afraid that he would assault her again, but eventually she agreed to meet up with him. (Id.) MR drove to meet

Appellant and when she pulled up, he looked very angry. (R. at 331). When she parked, Appellant opened her car door, grabbed her by the throat, and told her to “Get the fuck out of the driver’s seat and get in the car.” (R. at 331-332). When she got back in the car, Appellant grabbed her neck again. He strangled her until everything went black as he yelled at her. (R. at 333-334). Eventually, Appellant let go of her neck and drove them off base. He was driving fast. MR asked Appellant to slow down and told him “Stop driving my car crazy ... you could hurt us both.” Appellant told her “This isn’t your car anymore. This is my car.” (R. at 335).

MR was terrified. (R. at 336). She was scared Appellant was going to crash into a median. (R. at 335). She was crying and tried to open the door to jump out while he was driving down the highway. (Id.) MR tried to contact a friend for help, but Appellant took her phone. (R. at 337-338). He drove her to a parking lot overlooking a cliff. (R. at 338). He drove towards the cliff, and MR was screaming because she thought he was going to drive over the cliff. (R. at 338-339). Appellant stopped the car and laughed at MR before he started crying and yelling. (R. at 338). On the drive back to base, MR asked Appellant if he was really going to drive over the cliff. He told her he had planned to strangle her, drive out to a country road, and dump her body. (R. at 339).

MR deployed in July 2020. (R. at 351-352). MR and Appellant argued a lot while she was deployed, often because she would not conform to what he wanted. (R. at 360-361). MR felt very controlled in the relationship. (R. at 365). Appellant would make her feel bad about going to do things without him and claim she betrayed him by believing the accusations that he was cheating. (R. at 364-365). Appellant would imply he was suicidal to convince MR to talk to him or spend time with him. (R. at 365).

Around May 2021, MR broke up with Appellant. (R. at 362). Appellant tried to make her stay. (R. at 362, 363). He even called his parents to have them talk her into staying in the relationship. (Id.) Appellant refused to accept that the relationship was over. (Pros. Exs. 2, 3, 4, 5.) On 9 August 2021, a military protection order (MPO) was issued ordering Appellant to remain 100 feet from MR, not to contact her, and to cease threatening, stalking, following and assaulting MR. (Pros. Ex. 16).

He continued to bring MR gifts and insert himself into her life after she told him she wanted to be left alone. (R. at 363, 367). One time, he knocked on her door but hid out of view until she opened the door. (R. at 368). He told her that he did this because he “knew that if [she] saw it was [him] [she] wouldn’t have opened the door.” (Id.)

He would badger her about knowing where she was and who she was with. (Pros. Ex. 4). Appellant expected to receive a response to his messages. (Pros. Ex. 2, pg. 2, Pros. Ex. 5). When MR would not give Appellant the answer he wanted, he would become angry and make it known that he could find out information such as by sending her a photo of her car in the parking lot. (Pros. Ex. 4, pg. 11-12).

He repeatedly sent MR extremely long messages despite receiving no response back from her. (Pros. Exs. 2, 3). MR told Appellant to stop trying to be with her. (Pros. Ex. 4). MR told Appellant she lost feelings for him. Appellant told her he was taking it into his own hands because “this [is] not going to happen” and that he was “not going to see [her] with someone else.” Appellant felt he had showed her respect by “letting [her] leave”. (Id.) He told her he was done waiting and done giving her space. (Id.)

Despite MR repeatedly telling Appellant to leave her alone in many ways, Appellant would repeatedly call and text her. (Pros. Ex. 2, 3, 4, 5, 11, 12). He would call so often that her

phone would be unusable because it kept ringing. (R. at 663). MR would sometimes respond to Appellant or otherwise comply with what he was asking for because it would get him to stop harassing her. (R. at 369, 419). Appellant knew he could harass MR into compliance; he even texted her “Answer the phone and I’ll stop.” (Pros. Ex. 4, pg. 11).

One day, Appellant asked MR to come over to his apartment because he was upset. (R. at 369). At first, she agreed but when she realized he was being manipulative, she decided not to go. (R. at 370). Appellant was upset with her decision and told her “Bitch, I’ll kill you.” (Id.) He began crying and told her he didn’t mean it and again asked her to come over. (Id.) She hung up the phone. (Id.) MR felt terrified because Appellant’s emotions were unpredictable. She was afraid for her safety. (Id.)

On 2 August, Appellant texted MR nine times in a row without receiving a response from her. (Pros. Ex. 4, pg. 11). MR then blocked Appellant’s number. (R. at 390, 407). The next morning MR received a text from an unsaved number. (Pros. Ex. 5). She did not respond. She received another text saying, “[MR] I am sorry.” (Id.) MR identified the messages as coming from Appellant. (R. at 392-393). Appellant continued to text MR from this unsaved number even after she told him to stop texting her. (Pros. Ex. 5). He was irritated that she would not answer her the way he wanted. (Id.) He told her “[s]top with I’m busy shit going get you hurt [sic]” and “keep playing [MR] something going to happen [sic]”. (Id.) Appellant called MR twice after, but she did not answer. (R. at 415). The next morning, MR woke up to find her tire slashed. (R. at 410). Around 10 August, when Appellant found out he was under investigation, Appellant asked MR if she wanted reimbursement for her tire. (R. at 420, 421).

MR continued to have Appellant blocked on all social media and phone numbers. (R. at 422). Appellant created fake profiles and concealed his number to be able to keep contacting

MR. (R. at 420, 421, 574, 568-569); (Pros. Ex. 14, 15). MR knew it was Appellant contacting her when she would get a call from “No Caller ID” because when she would answer the phone it would be Appellant. (R. at 422, 663).

On 14 August, Appellant pulled up next to MR while she was driving and told her to go to the apartment. (R. at 421). She told him no. He again told her to pull over and held up a bouquet of flowers. (Id.) MR pulled into a gas station. When she parked, Appellant got in her car and started to ask about her day. She told him to get out. (Id.) As she drove away, she got a call from No Caller ID. It was Appellant. He told her he left his key fob in her car. (R. at 422). Later that day, he called her again about his key fob. She pulled into his apartment so he could look for it. Appellant convinced MR to go up to his apartment with him. When she went to leave, he blocked her exit and told her “You are not leaving, you are going to talk to me.” (R. at 423). He pointed out all the things he got for her and told her “We are going to have fun. You are going to hang out and talk to me.” (R. at 424). MR promised Appellant she would talk to him Thursday if he would let her go. (R. at 424-425). He agreed. He opened the door but as she was about to walk out, he grabbed her wrist tightly and slammed the door shut. (R. at 425). He told her he knew she was tricking him. (Id). He eventually let her go after she again promised to talk to him Thursday. (Id).

That Thursday, 19 August, MR was the apartment of her then boyfriend, DDA. (R. at 437). There was knocking on the door and DDA looked through the peephole. (R. at 654). He saw Appellant. (R. at 437, 654). MR and DDA heard rocks hitting the window. MR saw it was Appellant throwing the rocks. (R. at 437, 440). MR was scared and started crying. (R. at 656). DDA called the police. (R. at 437, 654).

When the police arrived, they encountered Appellant. He gave them a fake name and birthday. (R. at 715). While being detained, Appellant refused to comply with the police officer's orders, became belligerent and began thrashing around. He was arrested. (R. at 716). The next morning, Appellant was pacing outside the leasing office across the street from DDA's apartment and called MR 43 times. (R. at 441, 453, 454 – 455, 656); (Pros. Ex. 10, 11).

Around 23 August, MR again saw Appellant parked across the street facing DDA's apartment. (R. at 443). When she drove out of the parking lot, Appellant ran in front of her car. (R. at 444, 661); (Pros. Ex. 8). She had to swerve to miss him. (R. at 444). Appellant then called MR five times. (R. at 456); (Pros. Ex. 12).

Appellant's actions made MR feel afraid for her safety. She was scared and felt like she could never get away from Appellant. (R. at 458, 459). She was afraid Appellant would break into her apartment because he was able to find out her specific apartment number. (R. at 459). She was afraid he would strangle her again and was afraid of other physical violence. (Id.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR BY GRANTING THE GOVERNMENT'S IMPLIED BIAS CHALLENGE TO A COURT MEMBER BASED ON THE MEMBER BEING PREVIOUSLY ACQUITTED OF SIMILAR COURT-MARTIAL CHARGES.

Additional Facts

Appellant was charged with domestic violence in violation of Article 128b, assault in violation of Article 128, communicating a threat in violation of Article 115, and stalking in violation of Article 130. (ROT Vol 1, Charge Sheet). His court-martial was held on 31 March 2023. (ROT Vol 1, Entry of Judgment (EOJ)).

RF was in the venire for Appellant's court-martial. (R. at 93). During group voir dire trial counsel asked "[H]ave you or has anyone close to you ever been accused or charged with an offense similar to any of those in this case?" (R. at 111). RF responded affirmatively. (Id.) During individual voir dire, RF disclosed that he was previously charged with communicating a threat and assault with force likely to cause grievous bodily harm. (R. at 209-210). These were violations of Article 130 and 128, UCMJ, respectively. He was acquitted of the charges in 2020 but "because it was so similar" he answered affirmatively to the question. (R. at 210, 211).

While RF candidly explained the *mitigating* facts that he was instructing the people in the back seat of the car he was driving to put their seatbelt on, he glossed over the altercation leading to communicating a threat and assault with force likely to cause grievous bodily harm. (R. at 210). He said only that "it became a situation at that point." (Id.) He provided no facts about the assault or threat to distinguish his situation from Appellant's case. He equated his court-martial to him being falsely accused of a crime. (R. at 213). He stated "it would be hard not to" think back to his own experience as an accused when he found out he had court-martial duty. (R. at 213-214).

The Government challenged RF for implied bias. (R. at 262-263). Trial counsel articulated that a member of the public would have substantial doubt as to the fairness of the proceedings based on the overlap of the charges and because it was still fresh in RF's memory. (R. at 263).

The military judge granted the challenge for implied bias. (R. at 266). He stated that a challenge for implied bias is "an objective test that considers the totality of the circumstances as viewed through the eyes of the public and focuses on the potential perception or appearance of fairness of the military justice system." (R. at 264). He continued, "Implied bias exists when

most people in the same position as a challenged member would be prejudiced, regardless of whether this particular person actually is prejudiced.” (Id.) He found that most people in RF’s position would not feel fair and impartial as RF articulated he was. (R. at 265). He had “serious concerns” about whether an objective observer would find RF to be impartial. (Id.) He also found that an outside observer would have questions about someone who has been court-martialed for similar offenses being able to be impartial and not hold it against the government. (R. at 266).¹

Standard of Review

Courts apply a sliding scale standard of review between abuse of discretion and de novo to implied bias challenged based on the facts. United States v. Keago, 84 M.J. 367, 373 (C.A.A.F. 2024). “A military judge who cites the correct law and explains his implied bias reasoning on the record will receive greater deference (closer to the abuse of discretion standard), while a military judge who fails to do so will receive less deference (closer to the de novo standard). Accordingly, the more reasoning military judges provide, the more deference they will receive.” Id. (citing United States v. Rogers, 75 M.J. 270, 273 (C.A.A.F. 2016)).

Here, the military judge cited the correct standard and provided his reasoning on the record. Therefore, he receives greater deference closer to the abuse of discretion standard.

Law and Analysis

The military judge did not err in granting the challenge against RF for implied bias. The Government agrees with Appellant’s concession that the military judge cited the correct law.

¹ Appellant incorrectly states that the “military judge agreed” when trial defense counsel asserted that his ruling meant no prior accused, even when acquitted, could serve on any panel. Trial defense counsel made that assertion, but the military judge did not address it beyond further clarifying his ruling as it related to RF. (R. at 266).

(App. Br. at 6). The military judge correctly stated that implied bias is an objective test. He explained that it exists when most people in the same position as a challenged member would be prejudiced, regardless of whether this particular person actually is prejudiced. He concluded that the evaluation considers the totality of the circumstances focused on the potential perception or appearance of fairness in the military justice system. (R. at 265-266). This reflects our superior court's statement of the law in United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010). Because he cited the correct law, he is entitled to greater deference. Keago, 84 M.J. at 373.

While the military judge did not expressly state he was evaluating "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high", United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008), this single oversight in language does not totally negate his otherwise correct determination and recitation of the law. The expectation is not that the military judge give a "record dissertation" but that there is a "clear signal that the military judge applied the right law." United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (quoting United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)).

Appellant conflates actual bias with implied bias when arguing that RF's claim that he could be fair showed that the risk of him sitting on the panel was low. (App. Br. at 7.) RF stated that he believed he was unbiased, and the military judge found his claim to be sincere. (R. at 265). Because of that he found no actual bias. (*Id.*) Implied bias does not evaluate RF's claims. Instead, it evaluates whether most people in the same position as RF would have been prejudiced, regardless of whether RF was prejudiced. Bagstad, 68 M.J. at 462. The totality of the circumstances, not just RF's responses, are what inform the decision about whether the risk to the perception of fairness is too high. *Id.* The military judge correctly analyzed whether

“most people in his [meaning RF’s] position” would be prejudiced. (R. at 265). He found that they would. (R. at 266).

Appellant’s claim that the ruling was lacking because the military judge did not tie his ruling to the facts of RF’s case is unpersuasive because RF withheld the facts of his case when questioned. Instead, RF provided only a meager background of what happened before the charged incident and concluded “it became a situation at that point.” (R. at 210). He provided no information about the charged threat or the charged assault. RF’s withholding of facts increased the concern that an outside observer would question RF’s fairness or impartiality.

The military judge is entitled to deference closer to abuse of discretion based on his recitation of the law and analysis. The military judge correctly granted the challenge for implied bias against RF. RF was charged with violating Articles 128 and 130, UCMJ. Appellant was similarly charged with violating Articles 128 and 130, UCMJ. Most people sitting on a court-martial panel after having been acquitted of one of the same and other similar offenses would be prejudiced. Considering the totality of the circumstances, including RF’s withholding of the pertinent facts of his case such as the nature of the threat and assault, the risk is too high that a member of the public would perceive him to not be fair and impartial. Therefore, this Court should deny Appellant’s requested relief.

Should this Court disagree and find that the military judge erred in granting the challenge of RF, there was no prejudice. Appellant must show that he suffered prejudice from the excusal of RF. Dockery, 76 M.J. at 98-99. As in Dockery, what Appellant seeks to protect is his right to a fair and impartial panel. Id. at 99. There is no evidence, and he has not alleged any, that any remaining member of the panel was biased. Id. Therefore, Appellant has failed to show that he suffered prejudice from the excusal of RF, and this Court should deny his requested relief.

II.

APPELLANT’S CONVICTION FOR VIOLATING ARTICLE 115, UCMJ IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

By the time Appellant threatened to kill MR, he had strangled her twice – once to the point that she saw dots and another to the point that her vision started to go black, and she thought she was going to die. (R. at 320, 333); (ROT Vol. 1, EOJ). He had also grabbed her by the neck twice – once to pull her from the driver’s seat of her car and another during an argument in his dorm room. (R. at 331-332, 350); (ROT Vol. 1, EOJ). He told her about a plan he had to strangle her and dump her body on the side of the road. (R. at 339, 367). MR knew Appellant had firearms. (R. at 366). One time in his apartment, she heard him load a round into the chamber of his pistol behind her. (R. at 366-367).

During one conversation, Appellant called MR and wanted her to come over. (R. at 369). He implied he was going to commit suicide to lure MR over. (Id.) MR started to go over to his place but realized he was being manipulative. (R. at 369-370). She told him “I don’t believe you” and hung up on Appellant. (R. at 370). Appellant called her back very upset and said “Bitch, I’ll kill you.” He started crying again, apologized, told her he didn’t mean it and then asked for her to come over. MR hung up. (Id.) MR was terrified. (Id.) She was afraid for her physical safety because Appellant’s emotions were unpredictable. (Id.)

Standard of Review

This Court reviews legal sufficiency de novo. United States v. Harrington, 83 M.J. 408, 414 (C.A.A.F. 2023)(citing United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

A CCA “may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)].” 10 U.S.C. § 866(d)(1)(A). If all offenses

occurred on or after 1 January 2021,² factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows “a specific deficiency in proof.” 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 6 September 2024).

If both threshold elements are met, a CCA may “weigh the evidence and determine controverted questions of fact.” 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.” *Id.* The CCA must also give “appropriate deference to findings of fact entered into the record by the military judge.” *Id.* “[T]he degree of deference will depend on the nature of the evidence at issue.” Harvey, 2024 CAAF LEXIS 502, *8. Then, the CCA must be “clearly convinced that the finding of guilty was against the weight of the evidence” before they may “dismiss, set aside, or modify the finding, or affirm a lesser finding.” 10 U.S.C. § 866(d)(1)(B)(iii).

Law

Factual Sufficiency

Deference for a witness who testified might be high because the CCA judges did not see the witness testify, and the deference for objective evidence, like documents, might be low because the CCA can assess the evidence. Harvey, 2024 CAAF LEXIS at *8. It is within this court's discretion to determine what level of deference is appropriate. *Id.*

“[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” *Id.* at *10 (internal quotation marks omitted).

² National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

For this Court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” United States v. Kelnhofer, 2024 CCA LEXIS 492 (A.F. Ct. Crim. App. 15 November 2024)(citing Harvey, 2024 CCA LEXIS at *12). First, this Court must find that the evidence, “does not prove that the appellant is guilty beyond a reasonable doubt.” Id. Second, this Court “must be clearly convinced of the correctness of this decision.” Id.

Legal Sufficiency

The test for legal sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, a 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. United States v. Acevedo, 77 M.J. 185, 187 (2018). In applying this test, this Court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citation omitted).

“In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that 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.” Id. The standard 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). Legal

sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

Article 115, UCMJ

To prove Appellant violated Article 115, UCMJ, the Government must prove:

- (a) That [Appellant] communicated certain language expressing a present determination or intent to injure the person, property, or reputation of [MR] person, presently or in the future;
- (b) That the communication was made known to that [MR] or to a third person; and
- (c) That the communication was wrongful

Manual for Courts-Martial (MCM), Part IV, Para. 53(b)(1)(a)-(c).

The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage or destroy is not required.

Id. at Para. 53(c)(1).

A communication must be wrongful in order to constitute this offense. The wrongfulness of the communication relates to the accused's subjective intent. For purposes of this paragraph, the mental state requirement is satisfied if the accused transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat.

Id. at Para. 53(c)(2).

Analysis

Appellant was charged with violating Article 115, UCMJ by “wrongfully communicat[ing] to [MR] a threat to kill her. (ROT Vol. 1, Charge Sheet). Appellant’s conviction for violating Article 115, UCMJ, is legally and factually sufficient.

Legal Sufficiency

1. A reasonable person in MR's place would view Appellant's declaration "Bitch, I'll kill you" as a threat.

The first element of Article 115, UCMJ is an objective inquiry analyzing the threat from the perspective of a reasonable person in the recipient's place. Harrington, 83 M.J. at 414.

As Appellant states, context is important. (App. Br. at 11). A reasonable person in MR's place would have been violently assaulted by Appellant four times when he became angry with her for not acting how he wanted. (R. at 320, 331-333, 350); (ROT Vol. 1, EOJ). Two of instances caused her to see spots and once she thought she was going to die. (R. at 320, 331-333, 350). Appellant told her that he had planned to strangle her to death and leave her body on the side of the road. (R. at 339, 367). He had firearms and had once chambered a round behind her. (R. at 366-367). On the night at issue Appellant again became angry with MR because she would not come over to his residence like he wanted her to. He told her "Bitch, I'll kill you." (R. at 370). A reasonable person in MR's position would have viewed that statement as a threat.

Appellant subjected MR to a cycle of abuse. He would become emotional, assault MR, and then apologize. (Pros Ex. 3; R. at 331-332). His attempt to transform manipulative regret into a lack of sincerity when he threatened to kill MR is unpersuasive. Instead, his emotional state at the time of the threat bolsters the likelihood that a reasonable person in MR's position would perceive his statement as a threat. Given the cyclical nature of Appellant's conduct, a reasonable person would have been unpersuaded when Appellant said "he didn't mean it," and would have still perceived the prior "I'll kill you" statement express an intention to harm.

Further, Appellant's claim that he "didn't mean it" is irrelevant because it merely negates proof that he actually intended to kill MR. Proof that Appellant actually intended to kill MR is

not required. MCM, Part IV, Para. 53(c)(1). As explained above, a reasonable person in MR's position would have understood the words to communicate a present determination to injure MR.

A victim's reaction to a threat may provide useful context, but "it does not control any element" of Article 115. Harrington, 83 M.J.at 413. Even if MR had not perceived Appellant's statement as a threat, the conviction could still stand because the panel could be convinced that MR's reaction "differed from that of a reasonable person" Id. Despite this, MR did perceive Appellant's claim as a threat, contrary to Appellant's assertion. (App. Br. at 12.) MR testified that when Appellant said "Bitch, I'll kill you," she felt terrified because Appellant's emotions were changing so fast, and it was unpredictable. (R. at 370). This made her afraid for her own physical safety. (Id.) To claim that her fear for her physical safety was not because of Appellant's threat ignores the context. Appellant's emotions were changing from sad to angry when he was not getting his way. MR had gone through that before when Appellant strangled her. His threat that he would kill when he was angry her made her fear her physical safety. His emotional swing informed her of the danger inherent in the threat, but the emotions alone did not cause her fear.

Viewing this evidence in the light most favorable to the prosecution, a reasonable fact finder could find that the first element of Article 115, UCMJ was proved beyond a reasonable doubt. Therefore, Appellant's conviction is legally sufficient.

2. The Government proved that Appellant's communication was wrongful.

The third element of Article 115, UCMJ requires that the communication is wrongful. MCM, Part IV, para. 53(b)(1)(c). If Appellant transmitted the communication with the knowledge that the communication will be viewed as a threat, then wrongfulness is established.

MCM, Part IV, para. 53(c)(2), *See Harrington*, 83 M.J. at 414 (the question is whether the speaker intended his words to be understood as sincere).

‘Threats are most likely to be made while the speaker is in an emotional state, and those are the threats most likely to speak the truth about the speaker's seriousness’ United States v. Davis, 19 C.M.R. 160, 163 (C.M.A. 1955). “While words spoken in anger are often regretted upon calm reflection at a later period, this premise does not argue that at the time they were pronounced they did not reflect the then mental attitude of the speaker.” Id.

Appellant intended his words to be understood as sincere. This was shown through his immediate apology and claim that he didn’t mean it. Had Appellant not intended his words to be understood as sincere, he would have had no reason to apologize or offer clarification.

Appellant’s threats are not absolved of their sincerity because he was emotional. Because the threat was made when Appellant was upset, it is more likely that he intended it to be sincere.

Appellant’s claim that there is “very little that is menacing” about the situation disregards the repeated cycle of violence he inflicted upon MR prior to threatening her life. (App. Br. at 13). While he may not have brandished a firearm while threatening her, his pattern of getting angry, violently assaulting MR, and apologizing to her made the situation menacing and his statement that he would kill MR objectively threatening. Further, Appellant was attempting to get MR to bend to his will and come over to his apartment. Menacing her with a threat of violence, when she had already experienced violence at his hand, was how he did it.

Based on Appellant’s erratic emotional state, his expressions of regret, and the menacing context, a rational fact finder could find that Appellant intended his words to be understood as sincere. Therefore, Appellant’s conviction is legally sufficient.

Factual Sufficiency

Appellant has failed to allege a specific deficiency of proof and explain why any claimed deficiency contradicts the finding of guilty. Harvey, 2024 CAAF LEXIS 13. Where there has not been a specific showing of a deficiency in proof, Article 66 does not allow this Court to review the factual sufficiency of the evidence. Id. at *5-6.

Appellant's general claim that the Government failed to prove the first and third elements of Article 115, UCMJ, is insufficient. His argument amounts to merely a disagreement with the fact finder's conclusion that a reasonable person in MR's position would view the statement as a threat and that Appellant made the statement with the knowledge that it would be viewed as a threat. Our sister services, in published cases, have found a mere disagreement with the conclusion of a fact finder, even where there is conflicting evidence, to be insufficient to establish a deficiency of proof. *See United States v. Valencia*, ___ M.J. ___, 2024 CCA LEXIS 515, at *12 (N-M Ct. Crim. App. Dec. 5, 2024) (holding that a general disagreement with a verdict falls short of a specific showing of a deficiency in proof); United States v. Brassfield, ___ M.J. ___, 2024 CCA LEXIS 497, *12-13 (A. Ct. Crim. App. 20 November 2024) (finding contrary testimony by the appellant and inconsistencies in the victim's testimony to be insufficient to establish a specific showing of a deficiency in proof). This Court should follow our sister services and find that Appellant has failed to establish a specific showing of a deficiency in proof by merely disagreeing with the fact-finder's conclusion on elements one and three.

Should this Court disagree, this Court should not be clearly convinced Appellant's conviction was against the weight of the evidence. The evidence of Appellant's threat to kill MR was her testimony. Because this Court was unable to view MR's testimony in person, it should

afford greater deference to the finding of the trial court. Harvey, 2024 CAAF LEXIS at *8.

After reviewing MR's testimony about Appellant's emotional state, the threat, and the cycle of violence she endured prior to Appellant's threat to kill her, this Court should not be clearly convinced that the conviction was against the weight of the evidence.

Because Appellant's conviction for violating Article 115, UCMJ, is legally and factually sufficient, this Court should deny Appellant's requested relief.

III.

APPELLANT'S CONVICTION FOR VIOLATING ARTICLE 130, UCMJ, IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

The standard of review is the same as for Issue II.

Additional Facts

Appellant was found guilty of violating Article 130, UCMJ by engaging in a course of conduct directed at [MR] that would cause a reasonable person to fear bodily harm, to wit: physical harm to herself, by harassing and threatening her and by repeated maintenance of visual or physical proximity to her, that [Appellant] knew or should have known the course of conduct would place [MR] in reasonable fear of bodily harm, and that [Appellant's] conduct placed [MR] in reasonable fear of bodily harm. (ROT Vol. 1, EOJ).

Law

The law detailed in Issue II above is incorporated here.

To prove Appellant violated Article 130, UCMJ, the Government had to prove:

- (1) That [Appellant] wrongfully engaged in a course of conduct directed at [MR] that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or

herself, to a member of his or her immediate family, or to his or her intimate partner;

(2) That [Appellant] had knowledge, or should have had knowledge, that [MR] would be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

(3) That [Appellant's] conduct induced reasonable fear in [MR] of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner.

MCM, Part IV, Para. 80(b)(1)-(3).

Analysis

Specific Deficiency of Proof

The Government had to introduce sufficient evidence to prove, beyond a reasonable doubt, that Appellant harassed MR, threatened MR, and repeatedly maintained visual or physical proximity to MR such that a reasonable person would fear bodily harm, that Appellant knew or should have known it would place MR in fear of bodily harm, and that it caused MR to fear bodily harm. Appellant's general claim that the Government did not prove the elements of the offense fails to identify a specific deficiency of proof. Even his claim that the Government did not prove five identified courses of conduct fails to identify a specific deficiency of proof because it amounts to merely a disagreement with the fact finder as to the conclusion based on the facts the Government proved that Appellant ignores.

As explained in assignment of error II, our sister services have found such disagreements insufficient to establish a specific deficiency of proof. *See United States v. Valencia*, ___ M.J. ___, 2024 CCA LEXIS 515, at *12 (N-M Ct. Crim. App. Dec. 5, 2024)(Holding that a general disagreement with a verdict falls short of a specific showing of a deficiency in proof); *United States v. Brassfield*, ___ M.J. ___, 2024 CCA LEXIS 497, *12-13 (A. Ct. Crim. App. 20

November 2024)(Finding contrary testimony by the appellant and inconsistencies in the victim's testimony to be insufficient to establish a specific showing of a deficiency in proof). Because Appellant has failed to identify a specific deficiency of proof, this Court does not have the authority to conduct a factual sufficiency review. Harvey2024 CAAF LEXIS at *5-6.

Should this Court disagree, the Government introduced sufficient facts, through Appellant's obvious and attempted covert actions, that a rational fact finder could find that Appellant harassed MR, threatened MR, and repeatedly maintained visual or physical proximity to MR such that a reasonable person would fear bodily harm, that Appellant knew or should have known it would place MR in fear of bodily harm, and that it caused MR to fear bodily harm. This Court should not be clearly convinced that Appellant's conviction for violating Article 130, UCMJ, was against the weight of the evidence.

Legal and Factual Sufficiency

Appellants framing of this assignment of error incorrectly argues that if the Government did not prove five specific courses of conduct it could not have proved he violated Article 130, UCMJ. (App. Br. at 14-15). He makes this claim based on his perception that these actions alone constituted the charge. (Id.) This is incorrect. As Appellant acknowledges, there was not a bill of particulars in this case. (App. Br. at 14, n.4). The Government only had to introduce sufficient evidence that Appellant harassed MR, threatened MR, and repeatedly maintained visual or physical proximity to MR such that a reasonable person would fear bodily harm, that Appellant knew or should have known it would place MR in fear of bodily harm, and that it caused MR to fear bodily harm. The Government introduced a wide gambit of evidence from covering both obvious and attempted covert actions by Appellant to prove the charge beyond a reasonable doubt.

1. Appellant's obvious actions.

Appellant engaged in actions obviously attributable to him that support the specification that he harassed MR, threatened MR, and repeatedly maintained visual or physical proximity to MR.

Harassment

Appellant refused to accept MR's rejection of him. He incessantly texted her despite her explicitly telling her to stop several times. (Pros. Ex. 2, 3, 4). He showed up to her residence unannounced, and he concealed his presence to get her to open the door. (R. at 368). He forced his way into her room. (R. at 651). He sent her a photo of her car when she would not tell him where she was after he asked her six times. (Pros. Ex. 4, pg. 6, 7). After a MPO was issued, Appellant got her flowers and pulled up next to her while she was driving. (Pros Ex. 16; R. at 412). He went to her boyfriend's apartment and threw rocks at the window and pounded on the door. (R. at 439, 654). He would park his car with a view towards her boyfriend's apartment and wait for her to leave to follow her. (R. at 657, 658). One time when he observed her leaving, he ran into the street in front of her car, and she had to swerve to miss him. (R. at 444).

³ These facts sufficiently show that Appellant harassed MR.

Threatening

Appellant threatened MR when he told her of his thoughts about strangling her and dumping her body (R. at 339), and when told her that if she kept saying she was busy "something

³ Appellant's assertion that he was "on a run when he passed MR in her car" misstates the testimony and is contradicted by CCTV footage. App. Br. at 17. MR testified that she encountered Appellant when she noticed him "running towards her car." The CCTV footage shows Appellant exit his vehicle and run directly into the road in front of MR's vehicle. (Pros. Ex. 8); (R. at 447-449). Nothing indicates Appellant was "on a run" when he ran in front of her vehicle.

was going to happen.” (Pros. Ex. 5). Beyond that, Appellant was convicted of threatening MR when he told her “Bitch, I’ll kill you.” (ROT Vol. 1, EOJ).

Visual or Physical Proximity

Appellant repeatedly maintained visual and physical proximity to MR. Many of the facts supporting his harassment also demonstrate his repeated visual and physical proximity: showing up to her home unannounced, showing up to her boyfriend’s home unannounced, pulling up next to her car while she was driving, following her when she would leave her boyfriend’s apartment, and running towards her car while she is driving all support the conclusion that he repeatedly maintained visual or physical proximity. (R. at 368, 412, 439, 444, 654, 657, 658)

Fear of Bodily Harm.

Appellant’s behavior towards MR was a repeated cycle of violence involving violent assaults and threats against her life. She had been strangled multiple times. He had grabbed her by the neck and pinned her to the bed in anger. Appellant told her “Bitch, I’ll kill you.” (R. at 370). He told her of a plan he had to murder her and dump her body. (R. at 339). He told her that if she kept saying she was busy “something was going to happen.” (Pros. Ex. 5). This context is crucial for analyzing whether or not his actions of harassing, threatening, and maintaining visual or physical proximity to MR would place a reasonable person in fear of bodily harm, whether it placed MR in fear of bodily harm, and whether Appellant knew or should have known it would cause such fear. United States v. Gutierrez, 73 M.J. 172, 175-76 (C.A.A.F. 2014).

In Gutierrez, the court found the appellant’s actions of showing up to the victim’s home unannounced, repeatedly calling her and sending her text messages despite the victim blocking him and telling him not to contact her constituted stalking. In making this determination, the

court considered the other offenses the appellant was convicted of as well as the facts surrounding the offenses he was acquitted of. 73 M.J. at 176. Appellant's repeated actions, when considering his threats against her life and physical violence, caused MR to be afraid for her safety. She felt like she could never get away from Appellant. (R. at 458, 459). She was afraid he would break into her apartment and strangle her again or commit other violence. (R. at 459).

Appellant's citation to an unpublished, uncited opinion of our sister service decided before Gutierrez is unpersuasive because the facts are distinct. In United States v. Kirkpatrick, 2013 CCA LEXIS 41, *4-5 (A. Ct. Crim. App. 31 Jan 2013), the victim didn't respond to any of the appellant's messages but also insisted the appellant sleep in her bed with her after she found him in her home. She also left him alone with her children the next day. Because of this, the Court found that the evidence failed to establish his actions induced reasonable fear in her and failed to establish that he knew or should have known his actions would place her in fear. Id. MR's response to Appellant's actions was the opposite. She repeatedly told him to stop talking to her and to stop trying to get her back, avoided in person contact with him, and called the police on him.

Appellant's Knowledge.

Appellant knew or should have known that his actions would place MR in fear of bodily harm. As explained, the context of the cycle of violence is critical. Appellant knew he had caused MR physical harm when he would become angry with her. He knew MR was repeatedly rejecting him. During the harassment, when he finally convinced her to come up to his apartment, she kept backing away from him as he told her she was going to stay there. (R. at

424). He knew or should have known that him continuing to force himself into her life would cause her to fear physical harm.

These facts are ignored by Appellant in his claim that his conviction is not legally or factually sufficient. Even without the situations Appellant claims the Government did not prove, his actions are sufficient to support a rational fact finder's conclusion that Appellant stalked MR in violation of Article 130. Therefore, Appellant's conviction for violating Article 130, UCMJ, is legally sufficient. This Court should not be clearly convinced that Appellant's conviction is against the weight of the evidence. Therefore, Appellant's conviction is factually sufficient. Based on this, this Court should deny Appellant's requested relief.

2. Appellant's attempted covert actions.

Appellant is particularly concerned about the sufficiency of proof of whether he was in a car following MR on 4 July, whether he sent text messages or made calls from an unknown or manufactured number, whether he threw rocks at her boyfriend's window, whether he intentionally placed himself in her vicinity, and whether he slashed MR's tire. (App. Br. at 15-17). Aside from the fact that Appellant's conviction is sufficiently supported by the facts detailed in section 1 above, his argument is unpersuasive because there was evidence introduced to support that he engaged in the above conduct. In turn, the alleged conduct helped prove beyond a reasonable doubt that Appellant harassed, threatened, and maintained visual and physical proximity to MR.

First, although the evidence of Appellant following MR in a car on 4 July was contradicted testimony, the reaction of MR to being told Appellant was following them supports the finding that Appellant's actions caused MR to fear bodily harm. MR testified that she was hiding after LH told her and DDA it was Appellant following them erratically. (R. at 371, 473).

She testified that she was afraid for her safety after being told Appellant was following them. (R. at 473). This supports the fact finder concluding that the third element of Article 130, UCMJ, was met – that Appellant’s actions described above caused MR to fear bodily harm.

Second, there was sufficient evidence to support the fact finder concluding that Appellant slashed MR’s tire. MR testified that Appellant asked her if she wanted reimbursement for her tire after he found out he was under investigation. (R. at 420). There was no evidence that MR or anyone else told Appellant her tire had been slashed. His knowledge that her tire was slashed and offering to reimburse her for it supports the fact that Appellant slashed her tire. Appellant slashing MR’s tire supports the conclusion that he harassed MR and caused her and a reasonable person to be afraid of bodily harm.

Third, there was sufficient evidence that Appellant was throwing rocks at DDA’s window and pounding on his door. MR testified she saw Appellant below the window right after the rocks were thrown. (R. at 437). DDA testified that he could not identify who he saw after the rocks were thrown, but that he saw the person was wearing blue bathrobe. He then saw Appellant wearing that same blue bathrobe when he was banging on DDA’s door. (R. at 654). When the police arrived, Appellant gave them a fake name and became belligerent. (R. at 715-716). MR’s testimony of direct identification of Appellant right after hearing the rocks hit the window and DDA’s identification of Appellant after seeing him in the same blue bathrobe as the person below the window, when coupled with evidence of Appellant’s consciousness of guilt by giving a fake name to the police support that Appellant threw rocks at DDA’s window. Appellant throwing rocks at DDA’s window and pounding on his door supports the finding that Appellant harassed MR and repeatedly maintained physical or visual proximity to MR.

Fourth, there was sufficient evidence that Appellant intentionally placed himself in MR's vicinity after the military protection order (MPO) was issued. The MPO was issued on 9 August 2021. (Pros. Ex. 16). MR testified that on 10 August, Appellant approached her as she was leaving the leasing office and had her come to his apartment to talk. (R. at 420). She testified that on 14 August Appellant pulled his vehicle up next to hers and tried to get her to pull over by showing her he got her flowers. (R. at 421). That same day, he had her come to his apartment. When she tried to leave, he refused to let her go. (R. at 422-425). She tried to get away from him. (Id.) Additionally, MR and DDA testified that on 19 August Appellant pounded on DDA's door in the middle of the night. (R. at 437, 654). Finally, as described above, Appellant ran towards MR's car when she drove out of the apartment parking lot. This evidence establishes that repeatedly maintained visual and physical proximity to MR causing her to fear bodily harm.

Fifth, there was sufficient evidence that Appellant texted MR from the unknown number. The messages began five hours after MR blocked Appellant's known number. *Compare* Pros. Ex. 4, pg. 11 and Pros. Ex. 5. MR testified that she knew they were from Appellant because the conversation continued the same topic of him wanting to talk to her from his prior number. (R. at 392, 393). MR also knew it was Appellant because he spelled the nickname for her boyfriend the same way, referenced her being "in the apartment" and used his nickname for her. (R. at 392). In these messages, Appellant told MR "stop with I'm busy shit going [to] get you hurt[.][sic]" (Pros. Ex. 5). This statement communicates a threat – that if MR did not stop avoiding him, she was going to get hurt. This supports that Appellant harassed MR, and that he knew or should have known his actions would place her in fear of harm and that MR feared bodily harm.

Contrary to Appellant's claim, these attempted covert actions are sufficiently supported by the evidence. While not necessary to make his convictions legally and factually sufficient, they provided additional evidence that Appellant harassed MR, threatened MR, and repeatedly maintained visual or physical proximity to MR, and that his actions would cause a reasonable person to fear bodily harm, caused MR to fear bodily harm, and that Appellant knew his actions would cause fear of bodily harm.

A rational finder of fact could find that Appellant knew his actions were going to place MR in fear and that they did place MR in fear. In providing greater deference for the testimonial evidence and appropriate deference for the documentary evidence, this Court should not be convinced Appellant's conviction for violating Article 130, UCMJ is against the weight of the evidence. Therefore, this Court should deny Appellant's requested relief.

IV.

THE MILITARY JUDGE DID NOT PLAINLY ERR IN ADMITTING THE VICTIM IMPACT STATEMENT.

Additional Facts

MR offered a victim impact statement during pre-sentencing proceedings. (R. at 1050); ROT Vol. 3, Court Exhibit A. The military judge asked trial defense counsel if they had an opportunity to review the statement. (R. at 1051). Trial defense counsel said they had reviewed the exhibit. (Id.) MR read the statement. (Id). Trial defense counsel did not object when the statement was offered, when they acknowledge that they had reviewed it, or when the victim read the statement.

Standard of Review

In the absence of an objection at trial, this Court reviews claims of erroneous admission of a victim's unsworn statement for plain error, where an appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted).

Law and Analysis

Appellant claims three statements by MR in her impact statement were error: (1) MR was strangled by Appellant in her dorm room and then on two more occasions (2) that Appellant "would often see the devil in his dreams;" and (3) that because of Appellant's action MR worries for the safety of her future children and the next woman Appellant encounters.

Victim impact statements may include any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

When there is error regarding the presentation of victim statements under R.C.M. 1001, the test for prejudice "is whether the error substantially influenced the adjudged sentence." United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (quoting United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)). This is determined by evaluating the relative strength of the parties' cases along with the materiality and quality of the evidence in question. Id.(citation omitted).

MR's victim impact statement fell within the rules and to the extent any statement did not, the error was not plain or obvious and did not materially prejudice a substantial right of Appellant.

MR's statement that she was strangled by Appellant three times is appropriate under the rules. It appears MR was using colloquial language for being grabbed by the neck when she said

she was strangled two more times. Appellant was convicted of two specifications of strangulation and one specification of holding her to the bed by her throat with his hand. Any error in her single sentence that she was then strangled “two more times” is not plain and obvious. (ROT Vol. 3, Court Ex. A).

If this Court reads MR’s statement that she was strangled two more times after she was strangled in her dorm as referencing the legal meaning of strangled rather than the colloquial use of the word, it should find she is referencing a continuous course of conduct that directly relates to the Appellant’s conviction. Uncharged misconduct may be raised in a victim impact statement to the extent it shows a continuous course of conduct because it is relevant to rehabilitative potential. United States v. Teller, 2021 CCA LEXIS 444, *19-20 (A.F. Ct. Crim. App. 1 Sept 2021)(citing United States v. Nourse, 55 M.J. 229, 231 (C.A.A.F. 2001).

In Nourse, our superior court found evidence that the appellant stole \$30,000 of property from a sheriff’s office to be admissible where the appellant was convicted of stealing \$2,256 of property from the same sheriff’s office. 55 M.J. at 232. Here, Appellant’s course of conduct involved strangling MR twice and assaulting her by grabbing her neck once. MR’s feeling that she was strangled all three times directly relates to the charge of assault by grabbing her neck and is admissible to show the full impact of his actions on MR just as a higher amount of theft was found to be admissible in Nourse, 55 M.J. at 232.

MR’s statement that she worried about the safety of her husband and the family that they will create together, and that she was worried sick for the children she has yet to birth and the next woman he meets directly relates to her psychological impact. (Id.) This is shown by the sentences proceeding and following. MR first stated “I ask that you consider the extreme physical and mental pain he has caused me. I am petrified while thinking about what happens

after sentencing.” She followed the comment about her future children by saying “As a result of his actions, I will always be fearful and wonder if I am being stalked.” (Id.) She was explaining the fear and anxiety she *currently* was suffering from because of Appellant’s actions. She was not speculating about future events as Appellant attempts to frame the statement. This was psychological impact and proper for a victim impact statement. If it was error, it certainly was not obvious.

MR’s statement that Appellant would tell her he would see the devil in his dreams was not plain error and did not substantially influence the sentence. Appellant’s convictions are intertwined with threatening and menacing statements and behavior towards MR. MR believes in God. Appellant’s repeated statements that he saw the devil in his dreams were a continuation of his threatening behavior towards MR and his violent actions. Should this Court disagree and find the statements were improper, the statement did not substantially influence the sentence. MR does not claim that Appellant is possessed or unworthy of leniency in her statement as Appellant attempts to frame the statement. (App. Br. at 20-21). She uses their previous conversations as context for her current emotional turmoil by following it with “[Appellant] is now the Devil that haunts me in mine, every single week, for the past two years.” (ROT Vol. 3, Court Exhibit A). As explained below, the sentence shows the military judge did not use this statement to find Appellant was unworthy of leniency but instead gave him great leniency. Therefore, there is no prejudice.

This Court determines whether there was prejudice because of an improper victim impact statement by evaluating "(1) the strength of the Government's case; (2) the strength of the [D]efense[s] case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." Barker, 77 M.J. at 384 (citation omitted). "The Government bears the

burden of showing the error was harmless but need not show harmlessness beyond a reasonable doubt." Harrington, 83 M.J.at 422 (C.A.A.F. 2023)(citation omitted). "[I]t is highly relevant when analyzing the effect of error on the sentence that the case was tried before a military judge, who is presumed to know the law." United States v. Cunningham, 83 M.J. 367, 372 (C.A.A.F. 2023)(quoting Barker, 77 M.J. at 384).

Even assuming all the statements Appellant complains about were improper, these statements did not substantially influence the adjudged sentence. The Government's case was strong. Appellant was convicted of serious offenses – three specifications of domestic violence, two involving strangulation, one specification of communicating a threat to kill, and one specification of stalking. The offenses alone support the Appellant's sentence to two years of confinement and a bad conduct discharge. (ROT Vol. 1, EOJ). MR's physical and psychological impact that encompasses the rest of her page and a half impact statement further support the sentence. Appellant's sentencing case was weak. Of the six character letters he introduced, two were from his mother and grandmother and three appeared to have no knowledge of the offense which Appellant was convicted. (Def. Ex. G-I). The alleged improper statements by MR were not particularly material as shown by the fact that none of the statements were directly referenced by trial counsel in argument. Finally, trial counsel argued for 14 years of confinement and a dishonorable discharge, but the military judge sentenced him to only two years of confinement and a bad conduct discharge. His relatively low sentence reflects that the military judge was not substantially influenced by the statements. Therefore, there is no prejudice, and this Court should deny Appellant's requested relief.

V.

**THIS COURT'S PARTIAL GRANT OF APPELLANT'S
TWELFTH ENLARGEMENT OF TIME REQUEST DID NOT
DENY HIM EFFECTIVE ASSISTANCE OF COUNSEL**

Additional Facts

Appellant's case was docketed with this Court on 2 October 2023. He has had the same Appellate Defense Counsel since his case was docketed. His Appellate Defense Counsel filed 12 requests for enlargement of time (EOT) between 2 October 2023 and 15 November 2024. This gave him more than a year to file an assignment of error with this Court. Appellant has not alleged prejudice from the delay in appellate review and consented to the requests for enlargement of time.

The Court granted this twelfth request for EOT in part by granting counsel a 14-day enlargement rather than the requested 30 days. Appellate Defense Counsel subsequently filed five assignments of error with this Court.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Adams, 59 M.J. 367, 370 (C.A.A.F. 2004).

Law and Analysis

After an assignment of error has been filed with the Court, denial of a request for an EOT is only prejudicial if appellate defense counsel file a substandard brief, within the meaning of Strickland v. Washington, 466 U.S. 688 (1984), or if the appellant was prejudiced because of the delay in filing it. United States v. Greska, 65 M.J. 835 (A.F. Ct. Crim. App. 22 Oct 2007). Appellant has made no claim that he suffered prejudice because of the delay in filing. Therefore,

this Court must determine whether Appellate Defense Counsel's brief was so substandard to cause prejudice.

Claims that appellate defense counsel have rendered ineffective assistance are measured by the same test applicable to such claims lodged against a trial defense counsel. United States v. Hullum, 15 M.J. 261, 267 (C.M.A. 1983). The burden is on the accused to show that (1) performance by appellate defense counsel was deficient, and (2) that he suffered prejudice. Adams, 59 M.J. at 370. An appellant meets his burden on deficient performance when he demonstrates that his appellate counsel's performance was so deficient that it fell below an objective standard of reasonableness. Id. (citing Strickland, 466 U.S. 688).

Prejudice is met where the appellant shows that appellate counsel's errors were so serious to deprive him of a fair appellate proceeding whose result is reliable. Id. Prejudice does not exist where there is "no reasonable likelihood of a different result. United States v. Key, 57 M.J. 246, 249 (C.A.A.F. 2007). Appellant bears the burden of showing the result would have been different. Adams, 59 M.J. at 372 (citing United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001) (finding no prejudice where appellant failed to show a "reasonable probability" that a motion not filed would have been meritorious)).

This Court may address these two components in any order, and "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697.

1. Appellant was not prejudiced by this Court partially granting his counsel's twelfth request for an EOT.

Appellant bears the burden of demonstrating that the result would have been different. Key, 57 M.J. at 249; Adams, 59 M.J. at 372. Appellant has not met this burden. In fact, his counsel concedes that he "knows of no specific prejudice arising from his representation" and

merely claims without evidence that “likely something was missed.” App. Br. at 25. Because Appellant has not shown prejudice, this Court should deny his requested relief.

Further decreasing any claim of prejudice, this Court conducts an independent review of the entire record and can specify issues and request briefing should any additional issues be identified. *See Adams*, 59 M.J. at 371 (noting the CCA’s duty to review the entire record). Any hypothetical missed error would be evaluated by this Court in its independent review.

2. There is no evidence Appellate Defense Counsel’s performance was deficient.

Contrary to Appellant’s claim, this Court did not “force a filing” before Appellate Defense Counsel could competently review the record. App. Br. at 25. As Appellant noted, our superior court emphasized that this Court “may set and enforce deadlines.” *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). That is exactly what this Court did. Appellate Defense Counsel at the time did not find the deadline to be untenable as demonstrated by the fact that he did not file a motion for reconsideration of this Court’s order or a subsequent request for EOT. This belies any claim that the Court forced him to choose between competent representation or following an order of the Court. App. Br. at 25.

This Court, in balancing its duty to ensure Appellant’s interest in speedy appellate review and effective assistance of counsel appropriately granted a 14-day EOT and set a reasonable deadline after more than a year of delay by counsel. Doing so incentivized counsel to prioritize his client. Counsel then filed a 27-page brief consisting of five assignments of error with this Court with substantial citations to the record and relevant law. There is no evidence Appellate Defense Counsel’s brief was substandard. There is no evidence Appellant was denied an opportunity for adequate and full representation. There is no evidence counsel’s performance fell measurably below an objective standard of reasonableness.

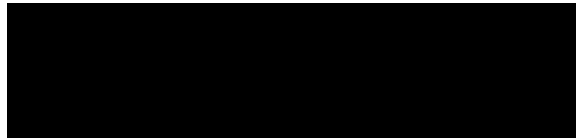
Appellant has failed to demonstrate that his appellate defense counsel was ineffective. Therefore, this Court should deny his requested relief.

CONCLUSION

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



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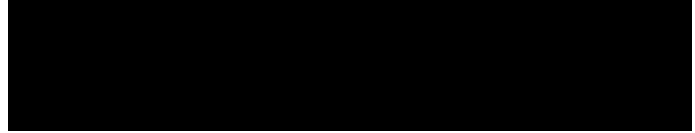


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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force

Appellate Defense Division on 8 January 2025.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES)	APPELLANT’S MOTION FOR
<i>Appellee</i>	)	ENLARGEMENT OF TIME
	)	(FIRST) TO FILE A REPLY
)	
v.	)	Before Panel No. 3
)	
Airman Basic (AB)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force	)	8 January 2025
<i>Appellant</i>)	

**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 first enlargement of time to file a Reply Brief to the Government’s Answer. Appellant requests an enlargement for a period of seven (7) days, which will end on **22 January 2025**. The record of trial was docketed with this Court on 2 October 2023. From the date of docketing to the present date, 464 days have elapsed. On the date requested, 478 days will have elapsed.

On 27 – 31 March 2023, Appellant was tried by a general court-martial comprised of enlisted and officer members, at Minot Air Force Base, North Dakota. Contrary to his pleas, R. at 81-82, Appellant was found guilty of one charge and three specifications of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one charge and three specifications of communicating a threat, in violation of Article 115, UCMJ. R. at 1037-38 Appellant was found not guilty of one charge and specification of simple assault under Article 128, UCMJ. R. at 1037. The military judge sentenced Appellant to two years of confinement and a bad conduct discharge. R. at 1083. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States*

v. AB Sincere N. Gibbs. Appellant is not currently confined. The ROT is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit. The transcript is 1,084 pages.

Undersigned counsel is currently assigned 26 cases; 18 cases are pending initial AOE's before this Court. No case before the Supreme Court of the United States or this Court has priority over this case. But, two cases before the Court of Appeals for the Armed Forces (CAAF) have priority over this case: *United States v. Valentin-Andino* and *United States v. Pulley*. Undersigned counsel has completed all filings in *Valentin-Andino*, but has oral argument scheduled on 14 January 2025. Undersigned counsel has completed two of three required moot arguments, with a third scheduled on Friday, 10 January 2025. Undersigned counsel anticipates working at least ten hours this coming weekend preparing for oral argument. For *Pulley*, undersigned counsel is presently drafting a supplement brief due to the CAAF on 16 January 2025. In addition to preparation for oral argument at the CAAF, undersigned counsel anticipates working the remainder of this week, this weekend, and early next week on this brief.

On 22 November 2024, this Court denied, in part, Appellant's motion for an enlargement of time. Order, *United States v. Gibbs*, dated 22 November 2024 [hereinafter "Order"]. In that Order, this Court found it appropriate to state that undersigned counsel had a "sanguine attitude" toward the "protracted" delays in this case. It is therefore necessary to correct this misconception. Since *at least* October 2024, the undersigned has worked nearly every evening of every workday, every weekend, every holiday,¹ and every purported family day.² Maintaining these types of

¹ This included a full day of work on Thanksgiving and New Years, as well as a half day of work on Christmas.

² This included full days of work on each family day.

hours negatively impact undersigned counsel's productivity and effectiveness.³ These hours also have a negative personal impact on undersigned counsel as they detract from the time he should dedicate to physical and mental recovery. Due to this Court's Order—as well as the pressing demands of the Appellate Defense Division—undersigned counsel continues to work late nights and every weekend. This will likely be the case for months to follow as the Government continues to fail to properly staff the Appellate Defense Division.

In the same Order referenced above, this Court chastised undersigned counsel for taking leave. Therefore, it should further be noted that undersigned counsel has taken slightly more than 40 days of leave since being assigned to the Appellate Defense Division. Much of this leave was “use or lose,” following undersigned counsel's tour as an Area Defense Counsel, which counsel took locally and during which he continued to work full days. The remaining days were personal trips, to include one to attend counsel's only brother's wedding where he was his brother's best man. Despite significant familial responsibilities on that trip, undersigned counsel worked while on leave—to include the morning of his brother's wedding. Most recently, undersigned counsel took leave to spend the Christmas holiday with his family in Michigan. Despite being on leave, undersigned counsel worked each day, to include the holiday of Christmas.

On 22 July 2024, this Court ordered that “any forthcoming requests for enlargements of time will include a specific statement as to counsel's progress on the case; specifically, the number of transcript pages reviewed to date, and the anticipated date of the completion of any remaining record review.” Order, *United States v. Gibbs*, dated 22 July 2024. This 22 July 2024 order did not specify whether it applied to enlargements of time for the initial assignment of error or subsequent

³ In fact, in the assignments of error brief for this very case, Appellant raised ineffective assistance of counsel against the undersigned due to the lack of time allowed by this Court to conduct a review of the record, complete research, and draft a brief.

enlargements of time. Therefore, based on a plain reading of the order and out of an abundance of caution, the undersigned counsel offers the following: undersigned counsel has completed a review of the entire record in this case.

This Court has also ordered that “any future requests for enlargements of time, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.” Order, *United States v. Gibbs*, dated 22 July 2024. Again, this Court did not specify whether this requirement applies only to enlargements of time for the initial assignments of error brief or future enlargements too. Therefore, the following information is provided as “exceptional circumstances:” (1) the number of cases older than Appellant’s case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant’s case or that require review at the CAAF. For example, approximately one week after the instant case was docketed, the CAAF granted review in *United States v. Smith*. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel* and *United States v. Daughma*—significantly older cases than Appellant’s. Moreover, since the docketing of this case, undersigned counsel has reviewed 20 records of trial for cases older than Appellant’s case.⁴ These records contained 12,767 transcript pages. Undersigned counsel has filed 14 briefs before this Court, not including three substantive motions. In addition, undersigned counsel has filed eight briefs before the CAAF (to include six supplements and three briefs on the

⁴ This includes *United States v. Beyer* which, although not a case older than Appellant’s, required an earlier review because civilian co-counsel was prepared to file an assignment of errors brief. See, e.g., Article 70(c), UCMJ.

merits). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and this Court in *Daughma*. Next month, undersigned counsel will also begin preparation for oral argument in *Valentin-Andino*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant's case. However, no such substitute counsel has been identified due to the Appellate Defense Division's workload. Though subject to manual counting, as of 27 September 2024, the Division's records reflect 117 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the thirteen fewer cases now reflect fifty-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-two percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 141 cases eligible for direct appeal forwarded to the Division's counsel versus 195 automatic appeals over that same time; (2) the Division's robust practice before the CAAF during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases

argued by Division counsel before this Court during the October 2023 term, and leading all military services heading into the October 2024 term with eight cases—only one fewer than all other services combined—granted review with briefing ordered so far; (3) the high volume of top-priority interlocutory appeals spread amongst the Division’s counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division’s counsel.

Division leadership has worked to mitigate the impact of these cases on the Division’s total workload and its impact on timely resolution of each appellant’s case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel’s parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division’s active duty staffing steady at previously existing levels.

Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division’s workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of

2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

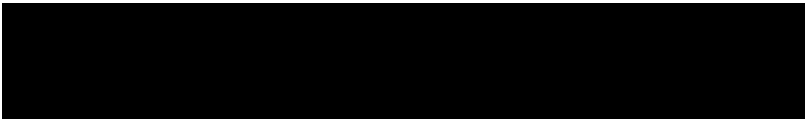
In undersigned counsel's motion for an enlargement of time (Tenth) in *United States v. Barlow*, the undersigned asked the Government to specify how they were meeting their obligations under Article 70, UCMJ, and *United States v. Moreno*, to provide adequate staffing to the appellate defense division. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation."). The undersigned further stated that "a failure to provide this information should be treated by this Court as waiver of any argument that the Government is providing adequate staffing." *United States v. Barlow*, Motion for Enlargement of Time (Tenth). The Government failed to provide the requested, resulting in waiver of any argument that the Appellate Defense Division is adequately staffed.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a reply brief in Appellant's case. Due to the demands on undersigned counsel's docket—to include argument at the CAAF in *Valentin-Andino* next Tuesday and a supplement brief to the CAAF in *Pulley* next Thursday—undersigned counsel cannot adequately prepare a reply brief. An enlargement of time is necessary to allow counsel time to complete a review of the Government's Answer, conduct research, and draft a reply. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he

consented to the request for this enlargement. Additionally, Appellant has provided limited consent to disclose a confidential communication whereby he was apprised of the status of undersigned counsel's progress on Appellant's case.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time. Should this Court believe denial of this enlargement of time is appropriate, Appellant requests a status conference.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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(240) 612-2807

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 8 January 2025.

Respectfully submitted,



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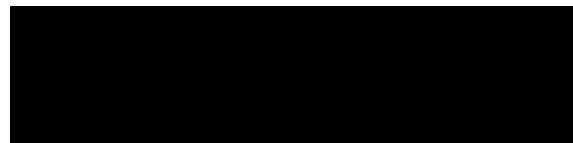
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION
	)	FOR ENLARGEMENT OF TIME
v.)	
)	
Airman Basic (E-1)	)	ACM 40523
SINCERE N. GIBBS, USAF,)	
<i>Appellant.</i>	)	Panel No. 3
)	

**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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

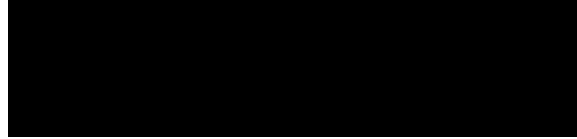
WHEREFORE, the United States respectfully requests that this Court grant Appellant's enlargement motion.



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 13 January 2025.



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,	)	REPLY BRIEF ON BEHALF
<i>Appellee,</i>	)	OF APPELLANT
)	
v.	)	Before Panel No. 3
)	
Airman Basic (E-1)	)	No. ACM 40523
SINCERE N. GIBBS,)	
United States Air Force,	)	21 January 2025
<i>Appellant.</i>)	

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

I. The military judge erred by granting the Government’s implied bias challenge to a court member based solely on the fact that the member was acquitted of court-martial charges.

This Court should review the military judge’s decision to exclude RF de novo. The Court of Appeals for the Armed Forces (CAAF) has held that the test for implied bias is an objective one. *United States v. Keago*, 84 M.J. 367, 372 (C.A.A.F. 2024). When a military judge provides little analysis for their decision to exclude a court member for implied bias, appellate courts should give such a ruling little deference. *Id.* Here, the Government concedes that the military judge’s rationale lacked specificity. Ans. at 10.

But even under a more deferential standard of review, it is clear the military judge erred. This is because the military judge misunderstood the standard for implied bias. The Government concedes the military judge articulated the wrong standard. Ans. at 10. And, while the Government calls the military judge’s erroneous understanding an “oversight in language,” the record makes clear what it really was: an actual misunderstanding of the proper legal standard.

The military judge conflated actual and implied bias in their rationale for excusing RF. Specifically, the military judge found, as a fact, that “most people in [RF’s] position” would be prejudiced. R. at 265. But, the test for implied bias is whether the public would view RF as biased,

not whether RF was himself biased. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010). The Government agrees such a conflation is error, but confusingly attributes blame for this conflation to Airman Basic (AB) Gibbs instead of the military judge. Ans. at 10.

The military judge further erred by failing to conduct the adequate analysis required by the CAAF in *Keago*. The Government excuses this error, ostensibly placing the blame on RF, claiming RF withheld facts from the court. Ans. at 11. This is an egregious misrepresentation of the record. RF answered every question posed to him by the military judge, Government counsel, and defense counsel. The military judge found that RF was candid and forthcoming. R. at 264-65. Any perception by appellate government counsel to the contrary is unsupported by the record and should be given no weight by this Court.

Instead of focusing on the facts before him and conducting the appropriate analysis, the military judge made a blanket ruling: “I think it’s pretty fair to say that most people, whether they are acquitted or not, the fact that they’ve been prosecuted by the Air Force[,] would feel some kind of hard feelings toward the Air Force.” R. at 266. The Government repeats this ludicrous position: “Most people sitting on a court-martial panel after having been acquitted . . . would be prejudiced.” Ans. at 11. This Court should be left unconvinced by the military judge’s (and, now, the Government’s) blanket rationale that no prior accused could ever sit on a court-martial panel. Holding otherwise is an affront to justice. Therefore, this Court should set aside the findings and sentence in this case.

II. Airman Basic Gibbs’s conviction under Article 115, Uniform Code of Military Justice, is legally and factually insufficient.

The Government failed to prove the first and third elements of this offense, making AB Gibbs’s conviction legally and factually insufficient.

First, the Government failed to prove that an objective, reasonable person in MR's position would view the communication as a threat. *MCM*, Part IV, ¶ 53(b)(1)(a). The Government agrees that context is important for this element. Ans. at 16. However, the Government proceeds to ignore the context contemporaneous to the communication. Ans. at 16 (asking this Court to dismiss AB Gibbs's contemporaneous statements following the purported threat). Instead, the Government focuses on charged and uncharged conduct that occurred weeks and months before the communication to demonstrate this element. This information—while not irrelevant—is far less important than contemporaneous context. *See United States v. Harrington*, 83 M.J. 408, 415 (C.A.A.F. 2023).

The Government further asks this Court to ignore or otherwise misinterpret MR's reaction to the communication, Ans. at 17, even though such evidence “provides useful context” for the first element. *Id.*; *United States v. Pittman*, No. ACM 40298, 2024 CCA LEXIS 145, at *18 (A.F. Ct. Crim. App. Apr. 22, 2024). Contrary to the Government's assertion, MR was not put in fear of the communication. Instead, she testified that she was “terrified, *because* [AB Gibbs's] emotions were changing.” R. at 370 (emphasis added). This is distinct from fear created by the communication itself.

Second, the Government failed to prove that AB Gibbs intended his words to be understood as sincere. *MCM*, Part IV, ¶ 53(b)(1)(c); *Harrington*, 83 M.J. at 414. There is no evidence suggesting AB Gibbs intended the communication to be understood as sincere. In *Harrington*, there was contemporaneous evidence suggesting the communication was intended as sincere. *Harrington*, 83 M.J. at 415. Here, AB Gibbs was sobbing, clearly emotional, and drunk. He made the communication but immediately apologized for it, saying he didn't “mean it.”

The Government argues that an “immediate apology” demonstrates the sincerity of the alleged threat. Ans. at 18. It is unclear how this is so—after all, nothing indicates lack of sincerity more than an immediate recantation and an apology. But, even if this Court believes the Government’s argument, this apology and its timing should nevertheless give this Court pause. Consider the breadth of speech that could be suppressed if, no matter the context, any communication containing threatening language is a crime.

This Court should find AB Gibbs’s conviction under Article 115, Uniform Code of Military Justice (UCMJ), legally and factually insufficient, and set aside the findings and sentence.

III. Airman Basic Gibbs’s conviction under Article 130, UCMJ, is legally and factually insufficient.

AB Gibbs relies primarily on his opening brief, offering only the following additional argument.

AB Gibbs was convicted of stalking, in violation of Article 130, UCMJ. To prove stalking, the Government must demonstrate a “course of conduct.” The Government proved no such course of conduct. In its Answer, the Government calls this argument a “general claim.” Ans. at 21. It is unclear how this is so, as AB Gibbs specifically noted the various “courses of conduct” which the Government failed to prove in his opening brief. And, interestingly, the Government discusses those same specific acts at length in its Answer. Ans. at 21-29.

The Government goes on to rely on several “obvious actions” to show a course of conduct. Ans. at 23. But all these actions fall in one of three buckets: (1) consensual activity between MR and AB Gibbs (such as phone calls and text messages to which MR repeatedly responded); (2) alleged acts ostensibly committed by AB Gibbs that no one saw (such as slashing tires, throwing rocks, and following a car MR was in); and (3) perceived proximity between MR and AB Gibbs

(such as AB Gibbs going for a run at his apartment complex). The first set of evidence is unpersuasive because that activity was consensual—MR was responding to texts, sending AB Gibbs pictures, answering his phone calls, and calling him. The second set of evidence is also unpersuasive because the Government failed to prove that AB Gibbs was involved in those incidents, despite having numerous witnesses testify. And the third set of evidence is unpersuasive because there is a reasonable explanation for why AB Gibbs was near MR: he lived where she, and her boyfriend, lived.

Because the Government failed to prove the requisite course of conduct, this Court should set aside the findings and sentence as to the Article 130, UCMJ, conviction as legally and factually insufficient.

IV. The military judge plainly erred by admitting an improper victim impact statement without affording either side an opportunity to object.

Court Exhibit A contained at least three types of improper victim impact: (1) that AB Gibbs committed an offense of which he was acquitted; (2) that AB Gibbs “would often see the devil in his dreams;” and (3) that MR worried about her unborn children and AB Gibbs’s future “women.”

First, stating that AB Gibbs committed three—instead of two—acts of strangulation was outside the scope of appropriate impact. R.C.M. 1001(c)(2)(B); *see United States v. Arroyo*, No. ACM 40321 (f rev), 2024 CCA LEXIS 242, at *12 (A.F. Ct. Crim. App. Jun. 18, 2024), *rev. granted* __ M.J. __, 2024 CAAF LEXIS 592 (C.A.A.F. 2024). The Government dismisses this argument, defending MR’s statement as “colloquial language.” Ans. at 30-31. This is an absurd justification in any forum, but particularly in the law where specific words have specific meanings.

Second, claiming that AB Gibbs saw the devil in his dreams is outside the scope of R.C.M. 1001(c)(2)(B) as it is unrelated to the offenses of which he was convicted. It is also dangerously prejudicial to AB Gibbs because of the inflammatory nature inherent in someone seeing evil

incarnate in their dreams. Nevertheless, the Government flippantly defends this phrase because it believes these statements were part of a pattern of abuse. Ans. at 32. There is no evidence to support this assumption and this Court should be left unconvinced.

Third, MR's worry about her hypothetical future children—as well as hypothetical future women in AB Gibbs's life—is too far removed from the charged misconduct to fall under R.C.M. 1001(c). Victim impact “does not allow ‘a never-ending chain of cause and effects’ to be relayed to the sentencing authority.” *United States v. King*, No. ACM 39583, 2021 CCA LEXIS 415, at *136 (A.F. Ct. Crim. App. Aug. 16, 2021) (citation omitted), *aff'd* 83 M.J. 115 (C.A.A.F. 2021). For the Government, this information was permissible for victim impact because it went to MR's psychological state—an apparent fear for future crimes not yet committed. Ans. at 31-32. Despite the Government's post-hoc attempt to justify this language, it was clearly outside the bounds of appropriate evidence.

Therefore, the military judge plainly erred and this Court should reassess AB Gibbs's sentence.

V. This Court deprived Airman Basic Gibbs his rights to effective appellate counsel by denying Airman Basic Gibbs's motion for an enlargement of time.

AB Gibbs relies primarily on his opening brief, offering only the following additional argument.

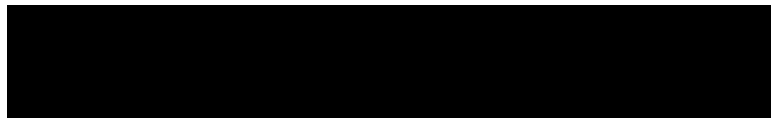
Like this Court, the Government misapprehends applicable, and binding, CAAF precedent. Specifically, the Government claims that there can be no prejudice on appeal for ineffective assistance of counsel because “this Court conducts an independent review of the entire record.” Ans. at 36. But, the CAAF has been clear that a court of criminal appeals's “independent review is not the same as *competent* appellate representation.” *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998) (emphasis added). This dangerous argument has been disposed of by the

CAAF, and the CAAF’s decisions in this area should be given their appropriate weight.

The Government also boldly claims that “Appellate Defense Counsel at the time did not find the deadline to be untenable as demonstrated by the fact that he did not file a motion for reconsideration.” Ans. at 36. Here, the Government fundamentally misunderstands the purpose of reconsideration motions. Reconsideration is for new facts or new law unavailable to the litigants *at the time of the original briefing*. See, e.g., A.F. Ct. Crim. App. R. 31.2(b). In this case, there were no new facts or law justifying reconsideration. To leave no doubt, undersigned counsel now avers—and would later attest if so ordered—that *he did* find the deadline untenable. And, while undersigned counsel did file a “27-page brief consisting of five assignments of error,” Ans. at 36, this Court’s order forced a filing before undersigned counsel could competently review the record, complete research, and draft identified errors.

Therefore, this Court should set aside the findings and sentence with prejudice.

Respectfully submitted,

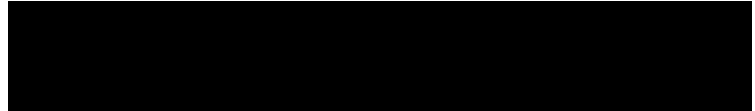


TREVOR N. WARD, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

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 21 January 2025.

Respectfully submitted,



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**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES)	No. ACM 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

Appellant’s case was docketed with this court on 2 October 2023. On 15 November 2024, counsel for Appellant, Major (Maj) TW, submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days—until 25 December 2024—in which to file Appellant’s assignments of error. Maj TW indicated he would complete his review of Appellant’s case by 30 November 2024. The Government opposed the motion.

On 22 November 2024, this court granted Appellant’s Motion for Enlargement of Time (Twelfth) in part, and directed “Appellant shall file any assignments of error not later than 9 December 2024.” The court’s order further advised the court expected “that this will be the final enlargement of time” and was “not inclined to grant additional enlargements of time, absent truly *exceptional circumstances . . .*”

On 9 December 2024, Maj TW filed Appellant’s assignments of error, raising five issues for this court’s consideration. Appellant’s final assignment of error asserted, “This Court deprived [Appellant] his rights to effective assistance of counsel by denying [Appellant’s] motion for an enlargement of time.” Appellant’s brief asserts, *inter alia*:

In this case, this Court’s order forced a filing before undersigned counsel could competently review the record, complete research, and draft identified errors. While undersigned counsel knows of no specific prejudice arising from his representation, it is likely something was missed. This may become clear when the Government’s answer—or this Court’s opinion—notes the shortcomings of [Appellant’s] appellate arguments. Moreover, denying [Appellant] an opportunity for adequate and full representation is inherently prejudicial, as it deprives him of his statutory and constitutional rights to effective assistance on appeal.

On 8 January 2025, the Government timely filed its answer to Appellant’s assignments of error. With respect to Appellant’s fifth assignment of error, the Government contends, *inter alia*, Appellant was not prejudiced by the partial denial of his Motion for Enlargement of Time (Twelfth), and there is no evidence Maj TW’s performance was deficient.

On 15 January 2025, this court granted an unopposed defense motion for an enlargement of seven days in which to file Appellant’s reply brief. On 21 January 2025, Maj TW timely filed Appellant’s reply brief.

LAW

A military accused has a fundamental right to effective assistance of counsel after his trial. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000) (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977)). “The test for ineffective assistance of appellate defense counsel is the same as the test for ineffective assistance of trial defense counsel . . .” *United States v. Miller*, 63 M.J. 452, 455 (C.A.A.F. 2006) (citations omitted). “This right . . . means the right to effective assistance of conflict-free counsel.” *United States v. Carter*, 40 M.J. 102, 105 (C.A.A.F. 1994) (citation omitted). “Where an accused attacks the competence of trial defense counsel, a conflict of interest may arise because it raises a question whether trial defense counsel is ‘mentally free of competing interests.’” *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997) (quoting *United States v. Cornelious*, 41 M.J. 397, 398 (C.A.A.F. 1995)).

Once defense counsel becomes aware his representation was allegedly ineffective, defense counsel should take steps to determine whether continued representation is appropriate. *See Carter*, 40 M.J. at 105 (citations omitted) (explaining such steps include advising the client about the consequences of terminating the relationship and determining appellant’s wishes thereon).

Under the Air Force Rules of Professional Conduct (AFRPC), an attorney must provide competent representation to a client and act with reasonable diligence in the client’s best interests. Air Force Instruction 51-110, *Professional Responsibility Program*, Attachment 2, *Air Force Rules of Professional Conduct*, Rules 1.1, 1.3 (11 Dec. 2018) (hereinafter *AFRPC*). “An attorney has an ethical duty to identify conflicts of interest concerning the attorney’s representation of a client and to take appropriate steps to decline or terminate representation when required by applicable rules, regardless of whether a party-litigant has filed a motion to disqualify the attorney.” *United States v. Humphreys*, 57 M.J. 83, 88 n.4 (C.A.A.F. 2002) (citations omitted). An attorney has a conflict of interest with a client when “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer.” *AFRPC*, Rule 1.7(a)(2).

“An accused may waive his right to conflict-free counsel.” *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (citing *United States v. Davis*, 3 M.J. 430, 433 n.16 (C.M.A. 1977)). Such a waiver is valid only when it is “voluntary” and based on “knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). “Courts will ‘indulge every reasonable presumption against the waiver’ of this right.” *Id.* (citation omitted). Under the AFRPC, when a conflict of interest arises, an attorney may only continue to represent the client if such representation is not prohibited by law and the “affected client gives informed consent, confirmed in writing.” AFRPC, Rule 1.7(b)(2), (4). “Informed consent” is an “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* at Rule 1.0(e).

Accordingly, it is by the court on this 28th day of January, 2025,

ORDERED:

In light of Appellant’s representation, through Maj TW, that Maj TW has been prevented from providing competent representation to Appellant, which Appellant asserts has affected the preparation of his assignments of error, not later than **11 February 2025**, counsel for the Government shall **SHOW GOOD CAUSE** as to why the court should not: (1) decline to consider Appellant’s 9 December 2024 assignments of error brief and 21 January 2025 reply brief due to an appearance of a conflict of interest between Maj TW and Appellant; and (2) request The Judge Advocate General appoint a conflict-free counsel for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel, and the potential waiver of the right to conflict-free counsel.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	UNITED STATES' RESPONSE TO SHOW CAUSE
)	
v.	)	Before Panel No. 3
)	
Airman Basic (E-1)	)	No. ACM 40523
SINCERE N. GIBBS)	
United States Air Force	)	11 February 2025
<i>Appellant.</i>)	

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

On 9 December 2024, Maj TW filed assignments of error on behalf of Appellant for this Court's consideration. Maj TW's fifth alleged error was that this Court deprived Appellant of his right to effective assistance of counsel by denying Appellant's motion for an enlargement of time. Maj TW did not file a motion to withdraw as counsel or provide the Court with written consent by Appellant to waive his right to conflict-free counsel.

On 28 January 2025, this Court sua sponte ordered the following: "In light of Appellant's representation, through Maj TW, that Maj TW has been prevented from providing competent representation to Appellant, which Appellant asserts has affected the preparation of his assignments of error, not later than **11 February 2025**, counsel for the Government shall **SHOW GOOD CAUSE** as to why the court should not: (1) decline to consider Appellant's 9 December 2024 assignments of error brief and 21 January 2025 reply brief due to an appearance of a conflict of interest between Maj TW and Appellant; and (2) request The Judge Advocate General appoint a conflict-free counsel for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel, and the potential waiver of the right to conflict-free counsel." (alterations in original).

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Harpole, 77 M.J. 231, 236 (C.A.A.F. 2018)(internal citation omitted). The right to effective assistance of counsel means the right to conflict-free counsel. United States v. Carter, 40 M.J. 102, 106 (C.A.A.F. 1994)(internal citation omitted).

Law and Argument

This Court should not decline to consider Appellant’s assignments of error brief or reply brief, nor should it request The Judge Advocate General appoint new counsel for Appellant because Maj TW does not have a conflict of interest. A claim of ineffective assistance of counsel does not automatically establish that detailed counsel is no-longer conflict-free. “Allegations of ineffectiveness create a *potential* conflict.” Carter, 40 M.J. at 106 (emphasis added). The purpose of requiring conflict-free counsel is to ensure counsel are “mentally free of competing interests.” United States v. Clark, 22 M.J. 708, 710 (A.C.M.R. 1986).

Maj TW did not have a conflict of interest because he did not attack his own ability or reputation. And Appellant has not submitted any affidavit or declaration claiming that he believes that his defense counsel inadequately represented him. Without an attack on an attorney’s reputation or abilities, there is nothing to defend against, and counsel continue to be conflict-free. “The primary reason for not allowing [] defense counsel to act on behalf of his client when his trial performance has been attacked is because the defense counsel’s interest in defending his reputation for competence conflicts with his interest in representing his client on appeal.” Clark, 22 M.J. at 710 (citing United States v. Smith, 5 M.J. 879 (A.C.M.R. 1978)).

Courts have found post-trial matters submitted by counsel before they were notified the client had claimed they were ineffective do not create a conflict in the mind of counsel. Carter,

40 M.J. at 105-106 (citing Clark, 22 M.J. at 710). Appellant's case is analogous to post-trial submissions made by trial defense counsel before they were notified that the client had claimed they were ineffective. Appellant's claim hinges on a speculation that error may be identified in the future. Just as the defense counsel in Clark and Carter did not know what error they would eventually have to defend against, Maj TW does not know what error he would have to defend against. (App. Br. at 25). Without knowing what future claim of error may arise, Maj TW could not have had an interest in defending his reputation at the time he filed his brief.

Further, the extremely speculative nature of the claim of ineffectiveness demonstrates there is no conflict because Maj TW's performance was not attacked. In claiming he was ineffective, Appellate Defense Counsel conceded that he "knows of no specific prejudice arising from his representation" but speculated that "it is likely something was missed." (App. Br. at 25). Such a vague and speculative claim does not attack an attorney's reputation or abilities. Maj TW merely set up an excuse to blame the Court's deadline should this Court disagree with or find fault in his arguments.

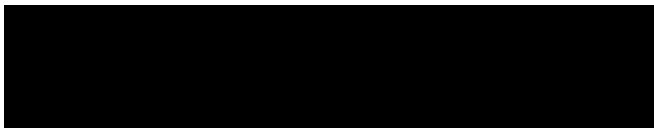
Additionally, Maj TW's claim does not show that "there is a significant risk that the representation ... will be materially limited ... by the personal interests of the lawyer." Air Force Rules of Professional Conduct, Rule 1.7(a)(2). There is no indication that Maj TW's personal interests have limited his representation. Rather than criticize his own abilities, Maj TW blames an outside force – the deadline set by this Court – for any mistake in his representation of Appellant that *might* be identified. Maj TW's claim that this Court's deadline may have limited his representation does not trigger a conflict-of-interest concern because it is not Maj TW's personal interest that allegedly limited his representation. Because Maj TW did

not attack his own reputation or allege his performance was deficient but instead blamed this Court's deadline for allegedly limiting his representation, there is not a conflict of interest.

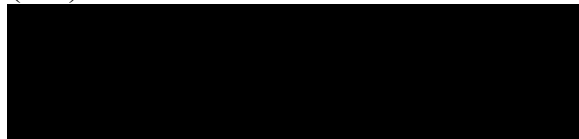
Finally, this Court should view this speculative claim of ineffective assistance skeptically. This claim stems from this Court's decision to partially grant Appellant's twelfth request for an enlargement of time. Appellant vaguely blames any potential weakness in argument on this Court enforcing a deadline to file a brief after 434 days but does not identify any specific issue that otherwise would have been raised or argument that could have been made. (App. Br. at 25). When appellate defense counsel are not granted all the time they want to file a brief, this Court should not reward Appellant's broad speculation that his counsel may have been ineffective by giving him additional time to file a brief with new counsel.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court consider Appellant's 9 December 2024 assignments of error brief and 21 January 2025 reply brief and not request The Judge Advocate General appoint another appellate defense counsel.



HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
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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 11 February 2025.



HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES)	No. ACM 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 3

Appellant’s case was docketed with this court on 2 October 2023. On 15 November 2024, counsel for Appellant, Major (Maj) TW, submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days—until 25 December 2024—in which to file Appellant’s assignments of error. Maj TW indicated he would complete his review of Appellant’s case by 30 November 2024. The Government opposed the motion.

On 22 November 2024, this court granted Appellant’s Motion for Enlargement of Time (Twelfth) in part, and directed “Appellant shall file any assignments of error not later than 9 December 2024.” The court’s order further advised the court expected “that this will be the final enlargement of time” and was “not inclined to grant additional enlargements of time, absent truly *exceptional circumstances . . .*”

On 9 December 2024, Maj TW filed Appellant’s assignments of error, raising five issues for this court’s consideration. Appellant’s final assignment of error asserted, “This Court deprived [Appellant] his rights to effective assistance of counsel by denying [Appellant’s] motion for an enlargement of time.” Appellant’s brief asserts, *inter alia*:

In this case, this Court’s order forced a filing *before undersigned counsel could competently review the record, complete research, and draft identified errors*. While undersigned counsel knows of no specific prejudice arising from his representation, it is likely something was missed. This may become clear when the Government’s answer—or this Court’s opinion—notes the shortcomings of [Appellant’s] appellate arguments. Moreover, denying [Appellant] an opportunity for adequate and full representation is inherently prejudicial, as it deprives him of his statutory and constitutional rights to effective assistance on appeal.

(Emphasis added).

On 8 January 2025, the Government timely filed its answer to Appellant’s assignments of error. With respect to Appellant’s fifth assignment of error, the Government contends, *inter alia*, Appellant was not prejudiced by the partial denial of his Motion for Enlargement of Time (Twelfth), and there is no evidence Maj TW’s performance was deficient.

On 15 January 2025, this court granted an unopposed defense motion for an enlargement of seven days in which to file Appellant’s reply brief. On 21 January 2025, Maj TW timely filed Appellant’s reply brief.

On 28 January 2025, “in light of Appellant’s representation, through Maj TW, that Maj TW has been prevented from providing competent representation to Appellant,” the court issued an order directing counsel for the Government to

SHOW GOOD CAUSE as to why the court should not: (1) decline to consider Appellant’s 9 December 2024 assignments of error and 21 January 2025 reply brief due to an appearance of a conflict of interest between Maj TW and Appellant; and (2) request The Judge Advocate General appoint conflict-free counsel for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel, and the potential waiver of the right to conflict-free counsel.

On 11 February 2025, the Government filed a timely response to the court’s show cause order. The Government contends this court “should not decline to consider Appellant’s assignments of error brief or reply brief, nor should it request The Judge Advocate General appoint new counsel for Appellant because Maj TW does not have a conflict of interest.” The Government contends “Maj TW did not have a conflict of interest because he did not attack his own ability or reputation.” The Government asserts the present situation is similar to that of a trial defense counsel who submits clemency matters on behalf of a client before the counsel has been notified the client is alleging trial defense counsel was ineffective at the client’s court-martial. *See United States v. Carter*, 40 M.J. 102, 105–06 (C.M.A. 1994). The Government further contends “the extremely speculative nature of the claim of ineffectiveness” and Maj TW’s placement of the blame on this court demonstrate the claim of ineffectiveness is not an attack on counsel’s reputation or abilities. Finally, the Government argues this court should not “reward” Appellant “by giving him additional time to file a brief with new counsel.”

Appellant has not provided the court with written confirmation of his informed consent to waive his right to conflict-free counsel.

LAW

A military accused has a fundamental right to effective assistance of counsel after his trial. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000) (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977)). “The test for ineffective assistance of appellate defense counsel is the same as the test for ineffective assistance of trial defense counsel . . .” *United States v. Miller*, 63 M.J. 452, 455 (C.A.A.F. 2006) (citation omitted). “This right . . . means the right to effective assistance of conflict-free counsel.” *United States v. Carter*, 40 M.J. 102, 105 (C.A.A.F. 1994) (citation omitted). “Where an accused attacks the competence of trial defense counsel, a conflict of interest may arise because it raises a question whether trial defense counsel is ‘mentally free of competing interests.’” *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997) (quoting *United States v. Cornelious*, 41 M.J. 397, 398 (C.A.A.F. 1995)).

Once defense counsel becomes aware his representation was allegedly ineffective, he should take steps to determine whether continued representation is appropriate. *See Carter*, 40 M.J. at 105. Such steps include advising the client about the consequences of terminating the relationship and determining appellant’s wishes thereon. *Id.*

Under the Air Force Rules of Professional Conduct, an attorney must provide competent representation to a client and act with reasonable diligence in the client’s best interests. Air Force Instruction 51-110, *Professional Responsibility Program*, Att. 2, Air Force Rules of Professional Conduct (AFRPC), Rules 1.1, 1.3 (11 Dec. 2018). “An attorney has an ethical duty to identify conflicts of interest concerning the attorney’s representation of a client and to take appropriate steps to decline or terminate representation when required by applicable rules, regardless of whether a party-litigant has filed a motion to disqualify the attorney.” *United States v. Humpherys*, 57 M.J. 83, 88 n.4 (C.A.A.F. 2002) (citations omitted). An attorney has a conflict of interest with a client when “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer.” AFRPC, R. 1.7(a)(2).

An accused may waive his right to conflict-free counsel. *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (citing *United States v. Davis*, 3 M.J. 430, 433 n.16 (C.M.A. 1977)). Such a waiver is valid only when it is “voluntary” and based on “knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). “Courts will ‘indulge every reasonable presumption against the waiver’ of this right.” *Id.* (citation omitted). Under the AFRPC, when a conflict of interest arises, an attorney may only continue to represent the client if such representation is not prohibited by law and the “affected client gives informed consent, confirmed in writing.” AFRPC, R. 1.7(b)(2), (4). “Informed consent” is an “agreement by a person to a proposed

course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* at R. 1.0(e).

“[T]he Courts of Criminal Appeals have broad powers to issue orders to counsel to ensure the timely progress of cases reviewed under Article 66[, UCMJ, 10 U.S.C. § 866,]” and may “ask[] the Judge Advocate General to direct the assignment of additional or substitute counsel.” *United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008) (citations omitted).

ANALYSIS

We have carefully considered the Government’s arguments; nevertheless, we find it appropriate to request the appointment of additional counsel for the limited purpose of advising Appellant with regard to his rights to effective representation by appellate counsel. A few points in the Government’s response warrant comment.

First, we do not find this situation is comparable to a trial defense counsel submitting clemency matters on behalf of a client prior to being notified of a claim of ineffective assistance. *See Carter*, 40 M.J. at 105–06. In this case, Maj TW *was* aware of the allegedly ineffective performance—that Maj TW had not “competently review[ed] the record” and “complete[d] research”—because Maj TW was himself asserting it.

Second, we do not agree that “Maj TW did not . . . allege his performance was deficient . . .” Appellant’s assignment of error asserts Maj TW did not “competently review the record, complete research, and draft identified errors.” It is true that Maj TW attributes this failure to the partial denial of Appellant’s twelfth motion for enlargement of time, but whatever the cause, Maj TW indicated the result was “sub-par advocacy.”

Third, whether or not Appellant’s claim of ineffective assistance directly implicates Maj TW’s abilities or reputation, the essential point is that Appellant is entitled to counsel who is “mentally free of competing interests.” *Cornelius*, 41 M.J. at 398. In this case, Appellant alleges he did not receive assistance that met the applicable standard of performance. Maj TW would appear to have a personal interest in how that failure is characterized. Without implying any lack of candor or untoward intent on Maj TW’s part in presenting Appellant’s assignments of error, we recognize Appellant is entitled to make an informed decision regarding his right to conflict-free counsel. We find it appropriate to request the appointment of additional counsel for the limited purpose of safeguarding that right.

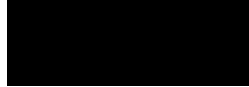
Accordingly, it is by the court on this 19th day of February, 2025,

ORDERED:

This court hereby requests that The Judge Advocate General appoint additional counsel for Appellant for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel and ability to waive his right to conflict-free counsel. No later than **11 March 2025**, counsel for the Government shall notify the court of the status of this court's request.



FOR THE COURT



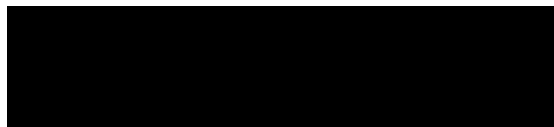
CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' RESPONSE TO
<i>Appellee,</i>	)	COURT ORDER
)	
v.	)	Before Panel No. 3
)	
Airman Basic (E-1)	)	No. ACM 40523
SINCERE N. GIBBS)	
United States Air Force	)	11 March 2025
<i>Appellant.</i>)	

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

In response to this Court's 19 February 2025 order, this United States reports that Major General Rebecca R. Vernon, performing the duties of the Judge Advocate General, has detailed Major Eshawn Rawlley to serve as additional appellate defense counsel in this case.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations
1500 W. Perimeter Rd, Ste 1190
Joint Base Andrews, MD 20762
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 11 March 2025.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations
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Joint Base Andrews, MD 20762
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

Airman Basic (E-1)

SINCERE N. GIBBS,

United States Air Force,

Appellant.

NOTICE OF APPEARANCE

Before Panel 3

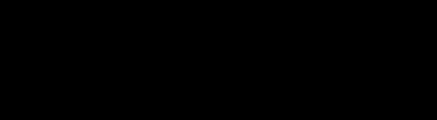
No. ACM 40523

26 March 2025

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

COMES NOW, Major Sara Hickmon, pursuant to Rule 12(a) of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. Major Hickmon has been appointed by The Judge Advocate General as additional appellate defense counsel for Appellant for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel and ability to waive his right to conflict-free counsel. Major Hickmon is currently assigned to the Contract and Fiscal Law Department of the Judge Advocate General Legal Center and School in Charlottesville, Virginia. Her contact information is in the signature block below.

Respectfully submitted,



SARA J. HICKMON, Maj, USAF

Appellate Defense Counsel

The Judge Advocate General's Legal Center & School
600 Massie St.

Charlottesville, Virginia 22903

Phone: (940) 206-4735

Email: sara.j.hickmon.mil@army.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 26 March 2025.

Respectfully submitted,



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Charlottesville, Virginia 22903
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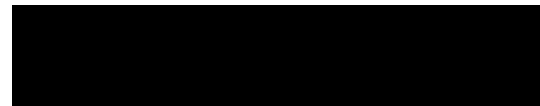
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

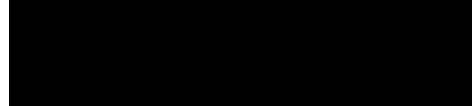
UNITED STATES,)	UNITED STATES' MOTION
<i>Appellee,</i>	)	FOR LEAVE TO FILE
	)	AMENDED RESPONSE TO
	)	COURT ORDER AND
v.	)	AMENDED RESPONSE
)	
Airman Basic (E-3)	)	Before Panel No. 3
SINCERE N. GIBBS	)	No. ACM 40523
United States Air Force)	
<i>Appellant.</i>	)	24 March 2025

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

Pursuant to Rule 23(d), the United States respectfully requests leave to file an amended response to this Court's 19 February 2025 order to appoint Appellant additional appellate defense counsel.

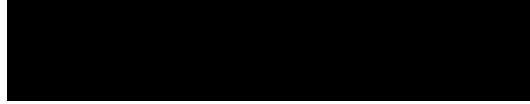
On 11 March 2025, Major General Rebecca R. Vernon, performing the duties of the Judge Advocate General, detailed Major Eshawn Rawlley to serve as additional appellate defense counsel in this case. Major Rawlley subsequently identified that he had a conflict of interest and was unable to represent Appellant. In response, on 20 March 2025, Major General Vernon detailed Major Sarah Hickmon to serve as additional appellate defense counsel in this case.


HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
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(240) 612-4800


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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 24 March 2025.



HEATHER R. BEZOLD, Capt, 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 40523
<i>Appellee</i>)	
)	
v.)	
	)	NOTICE OF
Sincere N. GIBBS	)	PANEL CHANGE
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>)	

It is by the court on this 3d day of April, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.



FOR THE COURT



TANICA S. BAGMON
Appellate Court Paralegal

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40523
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Sincere N. GIBBS)	
Airman Basic (E-1))	
U.S. Air Force)	
<i>Appellant</i>	)	Special Panel

On 22 November 2024, this court granted Appellant’s Motion for Enlargement of Time (Twelfth) in part, approving an extension of 14 days vice the requested 30 days, and directed “Appellant shall file any assignments of error not later than 9 December 2024.”

On 9 December 2024, Major (Maj) TW filed Appellant’s assignments of error, raising five issues for this court’s consideration. Appellant’s final assignment of error asserted, “This Court deprived [Appellant] his rights to effective assistance of counsel by denying [Appellant’s] motion for an enlargement of time.” Appellant’s brief asserted, *inter alia*, “this Court’s order forced a filing before undersigned counsel could competently review the record, complete research, and draft identified errors. While undersigned counsel knows of no specific prejudice arising from his representation, it is likely something was missed.”

On 8 January 2025, the Government timely filed its answer to Appellant’s assignments of error. With respect to Appellant’s fifth assignment of error, the Government contended, *inter alia*, Appellant was not prejudiced by the partial denial of his Motion for Enlargement of Time (Twelfth), and there is no evidence Maj TW’s performance was deficient.

On 21 January 2025, Maj TW timely filed Appellant’s reply brief after receiving another enlargement of time.

On 28 January 2025, this court issued an order to the Government to show good cause as to why this court should not: (1) decline to consider Appellant’s assignments of error and reply brief, and (2) “request The Judge Advocate General appoint conflict-free counsel for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel” On 11 February 2025, the Government filed a timely response contending this court should take neither

course of action. The Government argued, *inter alia*, “Maj TW did not have a conflict of interest because he did not attack his own ability or reputation,” and that this court should not “reward” Appellant “by giving him additional time to file a brief with new counsel.”

On 19 February 2025, this court “request[ed] that The Judge Advocate General appoint additional counsel for Appellant for the limited purpose of advising and assisting Appellant with regard to his right to the effective assistance of counsel, to include his right to conflict-free counsel and ability to waive his right to conflict-free counsel.” On 26 March 2025, Maj SH filed a notice of appearance with this court, indicating The Judge Advocate General had appointed her to advise and assist Appellant with regard to his right to effective assistance of counsel, as requested.

On 28 April 2025, Maj SH filed on behalf of Appellant a “Motion for Leave to File Motion for Disqualification and Motion to Strike.”¹ Appellant “requests that Maj TW b[e] disqualified from representing him and be removed from this case;” that “all previously filed briefs filed by Maj TW on behalf of Appellant be struck and not be considered by this Court;” and that this court “request The Judge Advocate General to appoint a conflict-free appellate defense counsel” to represent him. The filing states Appellant “does not waive his right” to conflict-free counsel, and contends “Maj TW is not just conflicted in the ineffective assistance of counsel claim, but rather this conflict runs over to the rest of his representation of [Appellant].”

On 5 May 2025, the Government opposed Appellant’s motion for disqualification and motion to strike.² The Government contends:

The extreme remedy of disqualifying Maj TW and striking all of his briefs, and delaying Appellant’s appellate review further, on vague claims that some kind of research or briefing could have been accomplished is an inappropriate remedy where there is nothing supporting the bald claim that Maj TW was ineffective or that the supposed conflict of interest impacted the other assignments of error.

The Government further argues that granting Appellant’s motions would “set an unfortunate precedent” by undermining this court’s ability to meet its responsibility for the timely management and disposition of cases before it, citing

¹ Although combined in a single filing, we note Appellant’s filing consists of three distinct motions: a Motion for Leave to File, a Motion for Disqualification, and a Motion to Strike.

² Although it opposed the underlying motions, the Government did not oppose Appellant’s Motion for Leave to File.

United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006) (“Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals.”).

A military accused has a fundamental right to effective assistance of counsel after his trial. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000) (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977)). “This right . . . means the right to effective assistance of conflict-free counsel.” *United States v. Carter*, 40 M.J. 102, 105 (C.A.A.F. 1994) (citation omitted). An attorney has a conflict of interest with a client when “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer.” Rule 1.7(a)(2), *Air Force Rules of Professional Conduct*, Air Force Instruction 51-110, *Professional Responsibility Program*, Att. 2 (11 Dec. 2018). The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Dataus*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

Although we grant Appellant’s motion for leave to file the subject motions, we find Appellant has not demonstrated cause for this court to either disqualify Maj TW or strike his assignments of error and reply brief. Fundamentally, other than the asserted conflict of interest, Appellant has not identified any material deficiency in Maj TW’s filings on Appellant’s behalf or other failure measurably below the performance expected of fallible lawyers. *See United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011). At its foundation, Appellant’s claim appears to be not that Maj TW provided deficient performance under the circumstances, but that this court erred when it did not grant his twelfth motion for enlargement of time in full—although he has not identified any particular prejudice.

Specifically with regard to disqualification, Appellant has not demonstrated good cause for this court to interject itself in his representation. Appellant cites Rule 10 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, which provides this court has “authority to regulate counsel appearing before it, including the power to remove counsel from a particular case for misconduct in relation to that case or to punish counsel for contempt” However, Appellant has not alleged any misconduct on the part of Maj TW.³

With regard to striking Appellant’s assignments of error and reply brief, Appellant has not identified any deficiency in the pleadings themselves; nor has he or his counsel at any point identified any potential issue the Defense was prevented from investigating or raising to the court; nor has Appellant

³ We note Maj TW has not moved to withdraw as counsel for Appellant, nor has Appellant released Maj TW as counsel.

moved to file a supplemental brief raising additional matters out of time for good cause shown.

Accordingly, it is by the court on this 8th day of May, 2025,

ORDERED:

Appellant's Motion for Leave to File dated 28 April 2025 is **GRANTED**. Appellant's Motion for Disqualification and Motion to Strike dated 28 April 2025 are **DENIED**.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

SINCERE N. GIBBS,

Airman Basic (E-1)

United States Air Force

Appellant.

**MOTION FOR LEAVE TO FILE
MOTION FOR DISQUALIFICATION &
MOTION TO STRIKE**

Before a Special Panel

No. ACM 40523

28 April 2025

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

Pursuant to Rule 18.4, 10, 23.3(p) of this Court’s Rules of Practice and Procedure, Airman Basic (AB) Sincere N. Gibbs requests leave of this Court to file a motion for disqualification and motion to strike.

FACTS

On 15 November 2024, counsel for Appellant, Maj TW, submitted a twelfth motion for enlargement of time with this Court. Appellant’s case had been docketed since 2 October 2023, and this Court partially granted the twelfth motion for enlargement of time directing the Appellant to file the assignment of error no later than 9 December 2024 (instead of the 25 December deadline requested by Appellant’s counsel in his enlargement of time). (Court Order, dated 19 Feb 25).

On 9 December 2024, per this Court’s order, Maj TW filed an assignment of error on behalf of Appellant. (Appellant’s Brief, dated 8 Dec 24). One of the five issues brought before this Court in the brief that Maj TW filed on Appellant’s behalf was that this Court deprived Appellant his right to effective assistance of counsel by denying the motion for enlargement of time. Maj TW asserted that this Court forced a filing before “counsel could competently review the record, complete research, and draft identified errors.” (*Id.* at 25).

On 28 January 2025, this Court ordered the Government to show good cause why the Court should not, 1) decline to consider Appellant’s assignment of error or reply brief filed by Maj TW, and 2) request The Judge Advocate General (TJAG) appoint conflict-free counsel for the limited purpose of advising and assisting Appellant with regard to his right to effective assistance of counsel to include his right to conflict-free counsel, and a potential waiver of the right to conflict-free counsel. (Court Order, dated 28 Jan 25). After reviewing the Government’s response to the Show Cause Order, the Court requested TJAG to appoint additional counsel for the limited purpose described in the Show Cause Order. (Court Order, dated 19 Feb 25). Undersigned counsel was later appointed by TJAG as requested by this Court. (Gov’s Amended Resp. to Court Order, dated 24 Mar 25).

Undersigned counsel has advised Appellant on his right to conflict-free counsel, Appellant does not waive this right.

STANDARD OF REVIEW

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018)(internal citation omitted).

LAW & ARGUMENT

An accused in the military justice system has a fundamental right to effective assistance of counsel, both during and after his trial. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000) (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977)). “The test for ineffective assistance of appellate defense counsel is the same as the test for ineffective assistance of trial defense counsel” *United States v. Miller*, 63 M.J. 452, 455 (C.A.A.F. 2006) (citation omitted). The right to effective assistance of counsel means the right to conflict-free counsel. *United States v. Carter*, 40 M.J. 102, 105 (C.A.A.F. 1994) (citation omitted). “Where an accused attacks the competence of trial defense counsel, a conflict of interest may arise because it raises

a question whether trial defense counsel is ‘mentally free of competing interests.’” *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997) (quoting *United States v. Cornelious*, 41 M.J. 397, 398 (C.A.A.F. 1995)).

Under the Air Force Rules of Professional Conduct (AFRPC), an attorney must provide competent representation to a client and act with reasonable diligence in the client’s best interests. Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Att. 2, Air Force Rules of Professional Conduct (AFRPC), Rules 1.1, 1.3 (11 Dec. 2018). “An attorney has an ethical duty to identify conflicts of interest concerning the attorney’s representation of a client and to take appropriate steps to decline or terminate representation when required by applicable rules, regardless of whether a party-litigant has filed a motion to disqualify the attorney.” *United States v. Humpherys*, 57 M.J. 83, 88 n.4 (C.A.A.F. 2002) (citations omitted). An attorney has a conflict of interest with a client when there is a “significant risk” that the representation will be materially limited by a personal interest of the lawyer. AFRPC, R. 1.7(a)(2).

“[T]he Courts of Criminal Appeals have broad powers to issue orders to counsel to ensure the timely progress of cases reviewed under Article 66[, UCMJ, 10 U.S.C. § 866,]” and may “ask[] the Judge Advocate General to direct the assignment of additional or substitute counsel.” *United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008) (citations omitted). This court also has the authority to regulate counsel appearing before it, including the power to remove counsel from a particular case. Rule 10, Court’s Rules of Practice and Procedure.

Appellant has the fundamental right to competent, conflict-free, appellate representation. AB Gibbs does not waive his right to conflict-free counsel. Based on Maj TW’s own assertions his advocacy was “sub-par” as he did not “competently review the record, complete research, and draft identified errors.” While it is laudable that Maj TW asserted his own ineffectiveness, it is clear that Maj TW has a conflict in the representation of AB Gibbs. Any attorney would have an

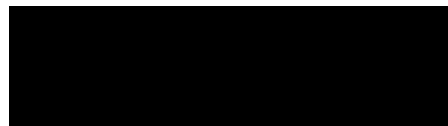
interest in how their failure is and is not characterized, and this competing interest undercuts Appellant's right to have conflict-free appellate representation.

Consequently, Maj TW is not just conflicted in the ineffective assistance of counsel claim, but rather this conflict runs over to the rest of his representation of AB Gibbs. It is difficult for an attorney to argue that his representation was sub-par but at the same time argue that despite this sub-par representation and briefing, this Court should issue relief on the other assignments of error. Appellant is entitled to have a conflict-free appellate defense counsel represent him on his entire case, not just on the ineffective assistance of counsel claim.

CONCLUSION

Accordingly, Appellant respectfully requests that Maj TW be disqualified from representing him and be removed from this case. In addition, Appellant respectfully requests that all previously filed briefs filed by Maj TW on behalf of Appellant be struck and not be considered by this Court. Furthermore, Appellant respectfully requests that this Court request The Judge Advocate General to appoint a conflict-free appellate defense counsel to not only represent him in the limited scope of the ineffective assistance of counsel claim and his right to conflict-free counsel, but also to represent him in his entire case on appeal.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 April 2025.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S
	)	MOTION FOR
	)	DISQUALIFICATION AND
v.	)	MOTION TO STRIKE
)	
Airman Basic (E-1)	)	Before Panel Special Panel
SINCERE N. GIBBS	)	No. ACM 40523
United States Air Force)	
<i>Appellant.</i>	)	5 May 2025

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States enters its opposition to Appellant's Motion for Disqualification and Motion to Strike.

FACTS

Over more than a year, counsel for Appellant, Maj TW requested twelve enlargements of time to file an assignment of error to this Court for Appellant's case. In response to the twelfth request, this Court did not grant Maj TW the entire thirty days he requested, but did grant him an additional 14 days. (Order, dated 22 November 2024).

Maj TW did not request reconsideration of the order, nor did he file another request for an extension of time. Instead, Maj TW submitted a brief containing five assignments of error to this Court. In that brief, Maj TW made vague claims that this Court's enforcement of deadlines after more than a year "forced" a filing before Maj TW could competently review the record, complete research, and draft identified errors. (App. Br. at 25). Maj TW did not identify any parts of the record he was unable to review, anything he was unable to research, or any errors he would have filed in his initial brief or his reply brief.

This Court directed conflict-free counsel be detailed to advise and assist Appellant regarding his right to effective assistance of counsel. (Court Order, dated 28 Jan 2025). Maj SH was appointed. (Gov's Amended Resp. to Court Order, dated 24 Mar. 25).

LAW AND ANALYSIS

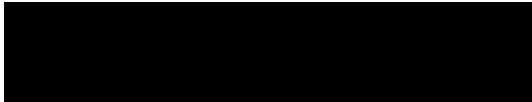
This Court should not disqualify Maj TW or strike all previous briefs filed by Maj TW on behalf of Appellant because there is no evidence Maj TW's claimed conflict of interest impacted his other assignments of error. The claim that Maj TW's representation was deficient throughout his briefing is not supported by the evidence. Neither Maj TW nor Appellant's current counsel have identified any deficiencies with Maj TW's briefing, what research should have been conducted, or what additional assignments of error should have been filed. This is because there is nothing. Maj TW's brief was not forced nor was it "sub-par."

The test for ineffective assistance of appellate defense counsel is the same as the test for ineffective assistance of trial defense counsel" United States v. Miller, 63 M.J. 452, 455 (C.A.A.F. 2006) (citation omitted). Ineffective assistance of counsel claims requires a showing that counsel's performance fell measurably below the performance ordinarily expected of fallible lawyers. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation omitted). The extreme remedy of disqualifying Maj TW and striking all of his briefs, and delaying Appellant's appellate review further, on vague claims that some kind of research or briefing could have been accomplished is an inappropriate remedy where there is nothing supporting the bald claim that Maj TW was ineffective or that the supposed conflict of interest impacted the other assignments of error.

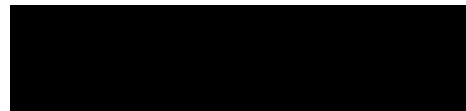
Further, granting Appellant's motions would set an unfortunate precedent. This Court has a mandate to process appeals in a timely manner. *See, e.g.,* United States v. Moreno, 63 M.J.

129, 137 (C.A.A.F. 2006) (“Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals.”). If appellate defense counsel could claim ineffectiveness every time this Court sets a strict deadline for filing a brief, this Court would be stripped of its ability to enforce that mandate. Here, any conflict of interest that Maj TW had was self-inflicted because of his own response to this Court only granting 14 of the 30 days he requested in his twelfth extension request. Granting relief by striking briefs – where Appellant’s new counsel has not even identified any deficiencies with the original brief – would not be an appropriate response. And granting such relief would just incentivize appellate defense counsel to claim ineffectiveness in order to gain more time to file briefs on behalf of their clients.

WHEREFORE, the United States respectfully requests this Court deny Appellant’s motion to disqualify Maj TW and strike all briefs previously filed by Maj TW on behalf of Appellant.



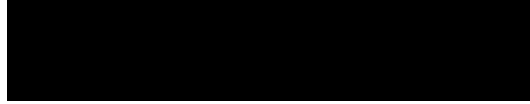
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 5 May 2025.



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