IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A)**
	)	
v.	)	
	)	
Senior Airman (E-4)	)	
CAMERON N. HOGANS	)	
United States Air Force	)	14 August 2023
Appellant	)	

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

On 5 May 2022, a military judge sitting as a special court-martial convicted Senior Airman (SrA) Cameron N. Hogans, pursuant to mixed pleas, of four specifications of wrongful use of controlled substances in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). The military judge sentenced SrA Hogans to 3 months' confinement, reduction to the grade of E-1, forfeiture of $1,222.00 pay per month for 3 months, and a reprimand. (Entry of Judgement, 21 June 2022.) On 31 May 2023, the Government sent SrA Hogans the required notice by mail of his right to appeal within 90 days. SrA Hogans received notice on 2 June 2023. SrA Hogans has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. Pursuant to the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, SrA Hogans files his notice of direct appeal with this Court.

Respectfully submitted,

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4700
Email: anthony.ortiz.5@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 August 2023.

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ortiz.5@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22091**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Cameron N. HOGANS	)	**DOCKETING**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 14 August 2023. On 28 August 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

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

ORDERED:

The case in the above-styled matter is referred to Panel 1. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 22091
CAMERON N. HOGANS	)	
United States Air Force	)	20 October 2023
Appellant	)	

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

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

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

ANTHONY D. ORTIZ, Col, USAFR
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Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4700
Email: anthony.ortiz.5@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 October 2023.

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: anthony.ortiz.5@us.af.mil

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CAMERON N. HOGANS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22091 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
	)	**ENLARGEMENT OF TIME**
Appellee	)	**(SECOND)**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 22091
CAMERON N. HOGANS	)	
United States Air Force	)	19 December 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **26 January 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 2-5 May 2022, Appellant was tried before a military judge sitting alone at a special court-martial. Record of Trial (ROT) at Vol. 1 – Coversheet; Entry of Judgment (EOJ), dated 21 June 2022. Appellant entered mixed pleas, pleading guilty to two specifications of the Charge and not guilty to two specifications of the Additional Charge. R. at 90. He was found guilty of the Charge and Additional Charge, involving four specifications of violating Article 112a, UCMJ. ROT, Vol. 1, EOJ.

The military judge sentenced Appellant to confinement for three months, forfeiture of $1,222.00 pay per month for 3 months, reduction to the grade to E-1, and a reprimand.[1] *Id.* The Convening Authority took no action on the findings in the case and approved the sentence in its entirety. ROT, Vol. 1, Convening Authority Decision on Action Memorandum, dated 25 May 2022.

Appellant's ROT consists of four volumes. There were 6 motions filed. The transcript is 448 pages. There are 4 prosecution exhibits, 5 defense exhibits, and 21 appellate exhibits. Appellant is no longer in confinement.

Good cause exists to grant this motion. Undersigned counsel requires additional time to complete his review of the record, draft an assignment of errors, and coordinate with the Appellant. Further, because undersigned counsel is a reservist and not currently on orders, he will need to coordinate his work in this case around his civilian work responsibilities as a trial attorney at the Department of Justice.

Accordingly, an enlargement of time is necessary to allow Appellant's counsel to fully review Appellant's case, advise Appellant regarding potential errors, and submit an Assignment of Errors brief on Appellant's behalf.

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

---

[1] SrA Hogans was sentenced to be confined for 3 months (Specification 1 of Charge I), 1 month (Specification 2 of Charge I), 3 months (Specification 1 of the Additional Charge), and 2 months (Specification 2 of the Additional Charge), with all terms of confinement to be served concurrently. ROT, Vol. 1, EOJ.

Respectfully submitted,

ANTHONY D. ORTIZ, Col, USAFR
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Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4700
Email: anthony.ortiz.5@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 December 2023.

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ortiz.5@us.af.mil

21 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CAMERON N. HOGANS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22091 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 22091
CAMERON N. HOGANS	)	
United States Air Force	)	19 January 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **25 February 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 2-5 May 2022, Appellant was tried before a military judge sitting alone at a special court-martial. Record of Trial (ROT) at Vol. 1 – Coversheet; Entry of Judgment (EOJ), dated 21 June 2022. Appellant entered mixed pleas, pleading guilty to two specifications of the Charge and not guilty to two specifications of the Additional Charge. R. at 90. He was found guilty of the Charge and Additional Charge, involving four specifications of violating Article 112a, UCMJ. ROT, Vol. 1, EOJ.

The military judge sentenced Appellant to confinement for three months, forfeiture of $1,222.00 pay per month for 3 months, reduction to the grade to E-1, and a reprimand.[1] *Id.* The Convening Authority took no action on the findings in the case and approved the sentence in its entirety. ROT, Vol. 1, Convening Authority Decision on Action Memorandum, dated 25 May 2022.

Appellant's ROT consists of four volumes. There were 6 motions filed. The transcript is 448 pages. There are 4 prosecution exhibits, 5 defense exhibits, and 21 appellate exhibits. Appellant is no longer in confinement.

Good cause exists to grant this motion. Undersigned counsel requires additional time to complete his review of the record, draft an assignment of errors, and coordinate with the Appellant. Further, because undersigned counsel is a reservist and not currently on orders, he will need to coordinate his work in this case around his civilian work responsibilities as a trial attorney at the Department of Justice.

Accordingly, an enlargement of time is necessary to allow Appellant's counsel to fully review Appellant's case, advise Appellant regarding potential errors, and submit an Assignment of Errors brief on Appellant's behalf.

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

---

[1] SrA Hogans was sentenced to be confined for 3 months (Specification 1 of Charge I), 1 month (Specification 2 of Charge I), 3 months (Specification 1 of the Additional Charge), and 2 months (Specification 2 of the Additional Charge), with all terms of confinement to be served concurrently. ROT, Vol. 1, EOJ.

Respectfully submitted,

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
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Office: (240) 612-4700
Email: anthony.ortiz.5@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 January 2024.

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ortiz.5@us.af.mil

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CAMERON N. HOGANS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 22091
CAMERON N. HOGANS	)	
United States Air Force	)	16 February 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **26 March 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 2-5 May 2022, Appellant was tried before a military judge sitting alone at a special court-martial. Record of Trial (ROT) at Vol. 1 – Coversheet; Entry of Judgment (EOJ), dated 21 June 2022. Appellant entered mixed pleas, pleading guilty to two specifications of the Charge and not guilty to two specifications of the Additional Charge. R. at 90. He was found guilty of the Charge and Additional Charge, involving four specifications of violating Article 112a, UCMJ. ROT, Vol. 1, EOJ.

The military judge sentenced Appellant to confinement for three months, forfeiture of $1,222.00 pay per month for 3 months, reduction to the grade to E-1, and a reprimand.[1] *Id.* The Convening Authority took no action on the findings in the case and approved the sentence in its entirety. ROT, Vol. 1, Convening Authority Decision on Action Memorandum, dated 25 May 2022.

Appellant's ROT consists of four volumes. There were 6 motions filed. The transcript is 448 pages. There are 4 prosecution exhibits, 5 defense exhibits, and 21 appellate exhibits. Appellant is no longer in confinement.

Good cause exists to grant this motion. This case is first in priority on undersigned counsel's Air Force docket, but undersigned counsel has three substantive briefs due to two federal district courts between February 21 – March 12, 2024 for his position as a trial attorney for the U.S. Department of Justice (DOJ). Undersigned counsel has reviewed the record of trial and identified a potential issue, but requires additional time for research, drafting an assignment of errors, and coordinating with Appellant. Further, because Col Ortiz is a reservist and not currently on orders, he will need to coordinate his work in this case around his civilian work responsibilities at DOJ.

[1] SrA Hogans was sentenced to be confined for 3 months (Specification 1 of Charge I), 1 month (Specification 2 of Charge I), 3 months (Specification 1 of the Additional Charge), and 2 months (Specification 2 of the Additional Charge), with all terms of confinement to be served concurrently. ROT, Vol. 1, EOJ.

Accordingly, an enlargement of time is necessary to allow Appellant's counsel to fully review Appellant's case, advise Appellant regarding potential errors, and submit an Assignment of Errors brief on Appellant's behalf.

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

Respectfully submitted,

[redacted]

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4700
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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 Appellate Government Division on 16 February 2024.

[redacted]

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: anthony.ortiz.5@us.af.mil

20 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CAMERON N. HOGANS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 February 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 22091**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Cameron N. HOGANS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 19 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 20th day of March 2024,

ORDERED:

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 22091
CAMERON N. HOGANS	)	
United States Air Force	)	19 March 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **25 April 2024**. The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed. Counsel withdraws the previously filed EOT 5 because it contained an error in the calculation of the dates, and undersigned counsel is including additional information regarding Appellant's consent to the enlargement of time.

On 2-5 May 2022, Appellant was tried before a military judge sitting alone at a special court-martial. Record of Trial (ROT) at Vol. 1 – Coversheet; Entry of Judgment (EOJ), dated 21 June 2022. Appellant entered mixed pleas, pleading guilty to two specifications of the Charge and not guilty to two specifications of the Additional Charge. R. at 90. He was found guilty of the Charge and Additional

Charge, involving four specifications of violating Article 112a, UCMJ. ROT, Vol. 1, EOJ.

The military judge sentenced Appellant to confinement for three months, forfeiture of $1,222.00 pay per month for 3 months, reduction to the grade to E-1, and a reprimand.[1] *Id*. The Convening Authority took no action on the findings in the case and approved the sentence in its entirety. ROT, Vol. 1, Convening Authority Decision on Action Memorandum, dated 25 May 2022.

Appellant's ROT consists of four volumes. There were 6 motions filed. The transcript is 448 pages. There are 4 prosecution exhibits, 5 defense exhibits, and 21 appellate exhibits. Appellant is no longer in confinement. Appellant has been advised of his right to a timely appeal and requests for enlargements of time. Appellant consents to an enlargement of time.

Good cause exists to grant this motion. This case is first in priority on undersigned counsel's Air Force docket, but undersigned counsel has had pressing obligations for his position as a trial attorney for the U.S. Department of Justice requiring him to submit three substantive briefs and two replies to briefs in three federal district courts between February 21 – March 18, 2024. Undersigned counsel has reviewed the record of trial and identified a potential issue, but requires additional time for research, drafting an assignment of errors, and coordinating with

[1] SrA Hogans was sentenced to be confined for 3 months (Specification 1 of Charge I), 1 month (Specification 2 of Charge I), 3 months (Specification 1 of the Additional Charge), and 2 months (Specification 2 of the Additional Charge), with all terms of confinement to be served concurrently. ROT, Vol. 1, EOJ.

Appellant. Undersigned counsel has scheduled upcoming days needed to complete the brief and anticipates that this will be the last request for extension needed for this case.

Accordingly, an enlargement of time is necessary to allow Appellant's counsel to fully review Appellant's case, advise Appellant regarding potential errors, and submit an Assignment of Errors brief on Appellant's behalf.

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

Respectfully submitted,

[redacted]

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4700
Email: anthony.ortiz.5@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 March 2024.

[redacted]

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: anthony.ortiz.5@us.af.mil

19 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CAMERON N. HOGANS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF APPELLANT**
Appellee	)	
v.	)	Before Panel No. 1
Senior Airman (E-4) **CAMERON N. HOGANS** United States Air Force	)	No. ACM 22091
	)	25 April 2024
Appellant	)	

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION IN LIMINE TO EXCLUDE PROSECUTION EXHIBIT 1, A VIDEO PUPORTING TO SHOW APPELLANT'S DRUG USE, WHEN THE GOVERNMENT DID NOT PROVIDE TO THE DEFENSE NOTICE OF OR ACCESS TO THE VIDEO UNTIL THE NIGHT BEFORE APPELLANT'S COURT-MARTIAL

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION AND ABANDONED HIS NEUTRAL ROLE WHEN HE ALLOWED THE GOVERNMENT TO REOPEN ITS CASE TO ESTABLISH A MISSING ELEMENT FOR SPECIFICATION 2 OF THE ADDITIONAL CHARGE

III.

ALTERNATIVELY, EVEN IF REOPENING THE GOVERNMENT'S CASE WERE PROPER, WHETHER SPECIFICATION 2 OF THE ADDITIONAL CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT

Statement of the Case

On 2-5 May 2022, Senior Airman (SrA) Cameron N. Hogans pleaded guilty to the specifications of the Charge before a miliary judge, was tried before members for the specifications of the Additional Charge, and was sentenced by a military judge sitting alone at a special court-martial convened at Luke Air Force Base, Arizona. Record of Trial (ROT), Vol. 1 – Coversheet; Entry of Judgment (EOJ), dated 21 June 2022; Record (R.) at 123-24, 447. Appellant entered mixed pleas, pleading guilty to two specifications of the Charge and not guilty to two specifications of the Additional Charge. R. at 90. He was found guilty of the Charge and Additional Charge, involving four specifications of violating Article 112a, Uniform Code of Military Justice (UCMJ). ROT, Vol. 1, EOJ.[1]

The military judge sentenced SrA Hogans to confinement for three months, forfeiture of $1,222.00 pay per month for 3 months, reduction to the grade to E-1, and a reprimand.[2] *Id.* The Convening Authority took no action on the findings in the case and approved the sentence in its entirety. ROT, Vol. 1, Convening Authority Decision on Action Memorandum, dated 25 May 2022.

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

[2] SrA Hogans was sentenced to be confined for 3 months (Specification 1 of Charge I), 1 month (Specification 2 of Charge I), 3 months (Specification 1 of the Additional Charge), and 2 months (Specification 2 of the Additional Charge), with all terms of confinement to be served concurrently. ROT, Vol. 1, EOJ.

Statement of Facts

All of the specifications in this case involved allegations that SrA Hogans wrongfully used various drugs on divers occasions in violation of Article 112a, UCMJ. ROT, Vol. 1, Charge Sheet. SrA Hogans pleaded guilty to Specifications 1 and 2 of the Charge—divers use of cocaine and marijuana between 1 March 2020 and 16 March 2021—but litigated the additional charge and its specifications relating to the divers use of lysergic acid diethylamide ("LSD"), and 3, 4 Methylenedioxymethamphetamine ("MDMA") in 2020. R. at 90.

Prior to trial, on 6 October 2021, trial defense counsel submitted its discovery request to the government. Appellate (App.) Ex. XII. Trial defense counsel requested the following:

> e. Access to, copies of, and a descriptive list of any physical evidence or photographs, in the Government's custody or control, seized, recorded, or reviewed during this investigation of this case, whether relied upon in charging or not. A list/copy of documents and other real evidence and location the Government intends to use at any trial findings, or presentencing including rebuttal. This includes the substance of any conversations which occurred that contained any evidence not disclosed under another paragraph.
>
> f. Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities and are material to the preparation of the Defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief or presentencing, or were obtained from or belong to the Accused. R.C.M. 70l(a)(2)(A). Please provide copies of any photographs taken to include the alleged crime scene and witnesses, if any.
>
> g. Disclosure of the existence of and copies of any audio/visual representations or renditions in the possession of any governmental agency or employee which could have any bearing whatsoever on this

> case. This includes those which may later become discoverable under the Jencks Act, l8 U.S.C. [§] 3500.

Id. ¶ 1.e-g

On 2 May 2022, the first day of SrA Hogans' court-martial, trial defense counsel raised an oral motion to exclude a video described in a notice provided by the Government on 1 May 2022[3] pursuant to M.R.E. 404(a), in part, due to a discovery violation under R.C.M. 701. R. at 17-21. The video was purportedly made by the Government's main witness, Airman Basic ("AB") BAM, and had been in the possession of the Air Force Office of Special Investigations ("OSI") since March 2021. R. at 20. Trial defense counsel informed the court: "So, the video has been in the possession of the Government for over a year, without prior discovery to the Defense until late last night, at approximately 10:00 p.m." *Id*.; *see also* R. at 262-99.

AB BAM testified about the contents of the video for the purposes of the motion. R. at 22-49. She claimed that she had recorded drug use of individuals on her iPhone and assembled a "montage video . . . like a compilation of different photos" that was sent to individuals in a group chat that included herself, SrA Hogans, and one other individual. R. at 30. AB BAM claimed that the video montage included herself, SrA Hogans, and three other individuals doing "lots of drugs" including LSD, MDMA, and marijuana. R. at 31; App. Ex. X. She also testified that OSI seized her

[3] Trial defense counsel erroneously states in the oral motion that notice was given on "2 May 2020" but confirms later that the Defense was provided with the video the previous night at approximately 10:00 p.m. R. at 19-20, 75.

phone pursuant to search authorization and released it back to her shortly before trial on 22 April 2022. R. at 37.

In describing her interactions with OSI, AB BAM testified that she had mentioned in her interviews has she had videos and pictures on her phone involving drug use, that she was interviewed multiple times in 2021 prior to receiving immunity, and that she was interviewed 5 or 6 times after she received immunity in November or December 2021. R.at 38, 40. Despite these interviews, AB BAM claimed that she had only disclosed to the Prosecution the existence of the video the previous night:

> I went into my text messaging because it's super easy to see photos in text messages. As I was looking through there, it was like the second one down. Went to the photos and that was the video. And I was like, oh my goodness. I messaged my lawyer and I was like, would you like to take a look at this. I haven't found what I was looking for, but I think I just found something that could be of use. And so he told me to send it to him, he looked it over and he went from there.

R. at 41.

Special Agent (SA) SCB, OSI's lead case agent on AB BAM's case, testified for the purposes of the motion. R. at 50-51. He testified that he executed a search warrant and seized AB BAM's iPhone on 16 March 2021. R. at 51, 53. Once the iPhone was seized, OSI conducted a review of the phone and extracted the contents of the phone to a hard drive via an extraction system known as Cellebrite, which produced a report. R. at 54-55. OSI was authorized to view "[a]ny multimedia that's specific to the narcotic use that they were looking for, so if it happened via video" on AB BAM's phone. R. at 56.

The military judge issued a ruling on the defense motion in limine, denying the Defense's request to exclude the video on the basis of a discovery violation. App. Ex. XVI at 13. He found that the defense had not met is burden to show that the Government's failure to provide the video prior to 1 May 2022 constituted a discovery violation, reasoning that "the Defense broadly requested discovery in many forms of evidence that would reasonably encompass the video contained in Appellate Exhibit X… [but] has not demonstrated the evidence was requested with sufficient precision to enable trial counsel to locate it." *Id*. at 11. Additionally, the military judge held that, even if a discovery violation occurred, the remedy of exclusion was too severe considering the circumstances of the late disclosure. *Id*. As support, he reasoned that the trial counsel was unaware of the video's existence until 1 May 2022, when AB BAM essentially volunteered it. *Id*. The military judge wrote: "The reason for the late discovery [was] the witness searching for the video and voluntarily providing it following pretrial interviews. Even if a discovery violation occurred, the truth-finding function of a court-martial would not be served by exclusion of this evidence." *Id*.

As a result, the Prosecution entered a portion of the video pertaining to SrA Hogans' alleged LSD use.[4] R. at 286; Pros Ex. 1. During its case-in-chief, the Prosecution called only called one witness, AB BAM, to testify as to the contested charges. R. at 262-99. AB BAM testified that Prosecution Exhibit 1 consisted of "mainly LSD" and included SrA Hogans in the video. R. at 277-78.

[4] The military judge excluded portions of the video in Appellate Exhibit X on the basis of M.R.E. 404(b) except the portions pertaining to purported LSD use. App Ex. XVI at 13.

Additional facts necessary for the disposition of the case are included in the arguments below.

Arguments

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION IN LIMINE TO EXCLUDE, PROSECUTION EXHIBIT 1, A VIDEO PUPORTING TO SHOW SRA HOGANS USING LSD, WHEN THE GOVERNMENT DID NOT PROVIDE TO THE DEFENSE NOTICE OF OR ACCESS TO THE VIDEO UNTIL THE NIGHT BEFORE SENIOR AIRMAN HOGANS' COURT-MARTIAL

Standard of Review

A military judge's ruling on whether a discovery violation occurred and decision to admit challenged evidence is viewed under an abuse of discretion standard. *United States v. Vargas*, 83 M.J. 150, 153 (C.A.A.F. 2023); *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021) (citation omitted).

Argument

Article 46, UCMJ, provides that trial counsel, defense counsel, and the court-martial have equal opportunity to obtain witnesses and other evidence in accordance with the rules prescribed by the President. 10 U.S.C. § 846. R.C.M. 703 also provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence."

Relating to the Prosecution's discovery obligations, R.C.M. 701(a)(2)(A) provides that, upon defense request, "[t]he Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings,

or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities, and . . . (i) relevant to defense preparation. . . . [or] (ii) the government intends to use the item in the case-in-chief at trial." Relevant evidence refers to evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401(a).

There are two categories of disclosure error: (1) cases in which the defense made no discovery request or merely a general request for discovery, and (2) cases in which the defense specifically requested the information. *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (citing *United States v. Roberts*, 59 M.J. 323, 326-27 (C.A.A.F. 2004). Under R.C.M. 701(g)(3), when a party has failed to comply with its discovery obligations, the military judge may take one or more of the following actions: "(A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances." Regarding exclusion of evidence, the Discussion to R.C.M. 701 provides factors for a miliary judge to consider including: "the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors."

In this case, it is uncontested that Prosecution Exhibit 1—the video purportedly showing SrA Hogans using LSD—was material and relevant in this case,

was used as one of the main pieces of evidence to convict SrA Hogans for LSD use, and served to bolster the testimony of AB BAM against SrA Hogans. It is also uncontested that Government investigators had this video in their possession for over a year and the Prosecution only disclosed the video the night before trial. Thus, the military judge erred when he improperly found that there was no discovery violation in this case and, even if there were one, that there was no available remedy.

First, the military judge abused his discretion by requiring trial defense counsel to anticipate that the Government would use the video in the future and specifically request the video in its discovery request. But the Government's discovery obligations are not so narrow. As this Court has recognized, "'Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial.'" *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (quoting *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004); *see also* R.C.M. 703((a) requiring both the prosecution and defense to have equal opportunity to obtain witnesses and evidence); Article 46 (the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence).

Despite the liberal requirements for discovery, the military judge incorrectly focused his determination on whether the Defense's discovery request was "requested with sufficient precision" to establish a violation under R.C.M. 701. App. Ex. XVI at 11. For one, trial defense counsel did include categories of "any audio/visual

representations or renditions in the possession of any governmental agency or employee which could have any bearing whatsoever." App. Ex. XII ¶ 1.g. This request would necessarily encompass a video in possession of OSI that purportedly shows SrA Hogans using LSD. Additionally, R.C.M. 701(a)(2) only requires that the Government, upon request from the Defense, permit the Defense the ability to inspect tangible objects "within the possession, custody, or control of military authorities . . . the government intends to use the item in the case-in-chief at trial." And here, trial defense counsel's request specified any physical evidence, seized by the Government, that it intended to use for the Prosecution's case-in-chief. App. Ex. XII. ¶ 1.e-f. The video is a tangible object that the Prosecution utilized in its case-in-chief and which was requested by the Defense; therefore, Prosecution Exhibit 1 falls within the meaning of R.C.M. 701(a)(2). And the Prosecution has a duty under R.C.M. 701(a)(6), to search beyond his or her prosecution files to include "'(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; [and] (2) investigative files in a related case maintained by an entity "closely aligned with the" prosecution.'" *Stelllato*, 74 M.J. at 486 (quoting *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999)).

The pertinent question therefore is not whether the Defense requested the video with "sufficient precision," but rather at what point should the Government be imputed to have had knowledge of the video within the meaning of R.C.M. 701. This question will guide whether the Government's late disclosure of the video was tantamount to a discovery violation. Indeed, a late disclosure of evidence can amount

to a discovery violation depending on the when the duty to disclose occurred. *See United States v. Behenna*, 70 M.J. 521, 527-28 (Army Ct. Crim. App. 2011) (determining whether a late disclosure of favorable evidence to defense on the day a verdict was rendered violated R.C.M. 701 and *Brady v. Maryland*, 373 U.S. 83 (1963)). Here, it should be imputed that the Government had knowledge of the video earlier than 1 May 2022 in light of its analysis of the phone and multiple interviews with AB BAM. *See United States v. Mansfield*, 1984 CMR LEXIS 3573, at *8 (N.M.C.M.R. 27 Sep 1984) ("military due process demands that, when such crucial information related to an accused's potential defense to a military crime is known to naval authorities such as those enumerated, above, knowledge thereof must be imputed to the Government."). Indeed, SA SCB testified that he seized AB BAM's iPhone and conducted his review in March 2021 and that the OSI performed an extraction of the contents of the phone in search of evidence of drug use, including video evidence of drug use. R. at 51, 53. 55-56. The miliary judge also found that, based on the Report of Investigation, another OSI agent reviewed multimedia images from the phone. App. Ex. XVI at 4. Notably, the miliary judge held that, in either November or December of 2021, AB BAM stated in an interview with OSI that she had "pictures and videos on her phone—which had been seized by OSI in March of 2021—which related to the subject of the investigation [but] neither OSI nor the trial counsel took steps to request AB [BAM] provide those images or photos from her phone." App. Ex. XVI at 4.

In light of the Government's control of AB BAM's phone and her multiple interviews with OSI prior to 1 May 2022, there is no apparent reason for why trial counsel could not have discovered this video through an exercise of reasonable diligence, especially in light of the mandatory disclosure requirements under R.C.M. 701(a)(2). *See Stelllato*, 74 M.J. at 486 (recognizing the Prosecution's duty to explore investigative files in a related case). The record reflects that there were multiple inspections of the phone prior to SrA Hogans court-martial and that AB BAM alerted the Government of possible videos as early as November or December 2021. Thus, rather than focusing on whether the Defense requested the evidence with "sufficient precision," the military judge should have addressed whether OSI investigative actions imposed upon the Government the duty to disclose this evidence earlier.

Moreover, the military judge compounded this error by failing to consider whether trial defense request had equal access to this evidence under Article 46 and R.C.M. 703 in light of the late disclosure. In general, the Government is required to provide equal access to material evidence prior to trial. *See Schmidt v. Boone,* 59 M.J. 841, 854 (A.F. Ct. Crim. App. 2004) ("The President set out rules for discovery of evidence and witnesses in [R.C.M.s] 701 and 703."); *United States v. Morris*, 52 M.J. 193, 197 (C.M.A. 1999) (considering Article 46, RCM 701 and 703 relating to disclosure of medical records); *United States v. T*so, 2016 CCA LEXIS 114, at *17. ("Rules for Courts-Martial 701 and 703 are the mechanisms for enforcing this constitutional and statutory right to discovery…."). Here, the military judge's ruling was tantamount to finding that the Government had no legal obligation to turn this

evidence over to trial defense counsel in advance of trial. Rather, his ruling upends the military justice system's liberal and open discovery requirements. "The military rules pertaining to discovery focus on *equal access to evidence* to aid the preparation of the defense and enhance the orderly administration of military justice." *Roberts*, 59 M.J. at 325 (emphasis added). And the Government's provision of a material piece of evidence that it had in its possession for over a year the night before trial while decrying any continuance of over 2-3 hours clearly violates this mandate. R. at 86.

Finally, in light of the apparent discovery violation, the miliary judge failed to exclude the evidence under R.C.M. 701(g)(3)—the only available remedy. Both the Prosecution and the Defense agreed that continuance of the proceedings was inappropriate.[5] R. at 80-82.[6] And the factors enumerated in the Discussion to R.C.M. 701 favor exclusion of this evidence, particularly "the extent of disadvantage that resulted from a failure to disclose." Whether intentional or not, this last-minute provision of evidence amounted to an unfair disadvantage that unquestionably required trial defense counsel to alter its strategy and argument to respond to a video

[5] Trial defense counsel observed there had already been "a lengthy continuance in this case, due to last-minute, additional charges being preferred and referred 2 days before the original docketed timeframe, of 6 January [2022]." R. at 80. Trial defense counsel also recognized that the length of delay was due to her availability, but that further delay was not conducive or appropriate for SrA Hogans, noting that the case had been extended past expiration term of service date and that he had a right to speedy trial. *Id*. The Government counsel agreed that continuance was inappropriate: "But we agree with Defense that this court should not be continued, Your Honor, that the, that the defendant does need to be tried here, the accused needs to be tried." R. at 81-82

[6] Government counsel noted that the Government would argue only "maybe 1 to 2 hours" for a continuance" but also noted that it "would be open… maybe 3 hours" for a continuance. R. at 86.

purporting to show SrA Hogans' LSD use. Notably, there were other individuals in the video montage who may have been able to testify as to SrA Hogans' alleged drug use in the video. R. at 31; App. Ex. X. Undoubtedly, this short amount of time was insufficient to allow the Defense sufficient time to properly explore this new, material evidence and alter its prepared strategy the day of trial. And because this improperly admitted evidence was of central importance to the Government's conviction of SrA Hogans for divers use of LSD, this Court should set aside Specification 1 of the Additional Charge.

WHEREFORE, SrA Hogans respectfully requests this Honorable Court set aside Specification 1 of the Additional Charge.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION AND ABANDONED HIS NEUTRAL ROLE WHEN HE ALLOWED THE GOVERNMENT TO REOPEN ITS CASE TO ESTABLISH A MISSING ELEMENT FOR DIVERS USE OF MDMA

Additional Facts

After the close of the Government's case and after hearing the testimony of the Defense's witness, the military judge indicated that he intended to raise a *sua sponte* motion under R.C.M. 917 regarding Specification 2 of the Additional Charge—divers use of MDMA. R. at 358. In particular, he noted that no evidence had been offered for the members to find that MDMA was a Schedule I controlled substance despite it being alleged in Specification 2 of the Additional charge. R. at 358-59.

After hearing arguments from counsel, the military judge ruled that he would allow the Government to reopen its case, following the Defense resting, finding "based

upon RCM 917, indicating that it's ordinarily appropriate for the military judge to permit the trial counsel to reopen the case." R. at 363. The military judge explained:

> As to, you know, the fairness or the propriety of sort of flagging this, or the judge *sua sponte* raising the issue, the alternative would be for me to permit the case to go to the panel when there's no legal possibility for the panel members to reach a finding of guilty on that specification. So it just doesn't seem appropriate for the members to be charged with deliberating on an offense that they cannot legally find the member of guilty of.

Id.

Over defense objection, the military judge allowed the Government to reopen its case to allow SA JF, an OSI agent, to testify. R. at 369; *see also* R. at 362. SA JF testified that MDMA was a Schedule I on the Drug Enforcement Agency's list of controlled substances. R. at 370.

Standard of Review

"'When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of [the] trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001) (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). The military judge's decision on the issue to reopen is reviewed for an abuse of discretion. *United States v. Satterley*, 55 M.J. 168, 169 (C.A.A.F. 2001).

Law

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citing *Ward v. Village of Monroeville*, 409

U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). A military judge is charged to "avoid undue interference with the parties' presentations or the appearance of partiality." R.C.M. 801(a)(3), Discussion. "In the military, a judge may not abandon his role as an impartial party and assist in the conviction of a specified accused." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987) (citing *United States v. Lindsay*, 12 C.M.A. 235 (C.M.A. 1961)).

R.C.M. 917(a) provides, "The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but prior to entry of judgment if the evidence is insufficient to sustain a conviction of the offense affected." The Discussion to R.C.M. 917 states, "For a motion made under R.C.M. 917(a), the military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion before findings on the general issue of guilt are announced." R.C.M. 913(c)(5) permits a military judge to allow a party to reopen its case once it has rested as a matter of discretion, but case law has established that a party seeking to reopen its case should proffer some reasonable excuse for its request.[7] *See United States v.*

[7] The text of R.C.M. 917(a) makes it unclear whether the military judge can raise a *sua sponte* motion under the rule or only enter *sua sponte* findings of not guilty for a charge. The analysis to R.C.M. 917(a) notes that the application of R.C.M. 917(a) is similar to practice in U.S. District Court, which would apply Fed. R. Crim. Proc. 29(a). *See* MCM, A15-17. Notably, Fed. R. Crim. Proc. 29(a) does not state that a court raises a *sua sponte* motion for judgments of acquittal, but only states, "The court may on its own consider whether the evidence is insufficient to sustain a conviction." Thus, the discussion to R.C.M. 917 that provides that the military judge ordinarily "should permit the trial counsel to reopen the case as to the insufficiency specified in the motion" may only pertain to situations where defense counsel raises a motion. *But see Manual for Courts-Martial, United States* (2016 ed.), App 21-66-67 (noting that

Ray, 26 M.J. 468, 471 (C.M.A. 1988); *United States v. Talkington*, 2013 CCA LEXIS 357, at * 23-24 (A.F. Ct. Crim. App. 26 Apr. 2013); *United States v. Adams*, 74 M.J. 589, 591 (Army Ct. Crim. App. 2015).

Here, the military judge misapplied R.C.M. 917 by identifying a deficiency in the evidence and allowing the Government to correct its error without first making any inquiry as to the reasoning for the Prosecution's failure to present any evidence during its case-in-chief. It was incumbent upon the military judge to ascertain some reasoning for why the Government did not present sufficient evidence to establish all elements of its charged offense before allowing the Government to reopen its case. In *United States v. Ray*, a case cited by the Prosecution at trial, the then-Court of Military Appeals explained that a party moving to reopen its case "should proffer some reasonable excuse for its request to reopen its case." 26 M.J. 468, 472 (C.M.A. 1988).

But contrary to its cited case law, the Government offered no "reasonable excuse" here for why it failed to present evidence showing that MDMA is a Schedule I controlled substance. R. at 360-61. The Government had a duty to establish the elements of its charged offenses during its case-in-chief, but chose to present a single fact witness to establish the elements for SrA Hogans' alleged MDMA use. Notably, the defense's own forensic expert testified to his extensive knowledge of the research and effects of MDMA and may have testified regarding MDMA. Yet, the Government

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R.C.M. 917(a) was based in part on the Paragraph 71 *a* of the 1969 Manual that did not expressly provide for a motion for a finding of not guilty to be made *sua sponte*, "as does Fed. R. Crim. P. 29(a)."

failed to elicit relevant information of MDMA during its cross-examination of the witness. *See* R. at 317, 326-38.[8]

Moreover, the military judge's decision to identify the deficiency to the Prosecution and allow the Government to cure its error using a witness with no experience with MDMA cases or specialized training gave the appearance of partiality in this case. *See* Argument III, *infra*; R.C.M. 801(a)(3), Discussion*; Reynolds*, 24 M.J. at 264 ("Public confidence in the integrity and impartiality of a judge is sustained in large part by the conduct of a judge during the proceeding.") *see also United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982) (explaining that the disqualification of a judge who impartiality is being questioned may be based on "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned."). Accordingly, SrA Hogans' conviction for divers use of MDMA must be set aside.

WHEREFORE, SrA Hogans respectfully requests this Honorable Court set aside Specification 2 of the Additional Charge.

[8] The defense expert was a forensic psychologist but testified that he had advanced training in substance abuse consisting of 400 hours with the American Academy of Forensic Psychology, was familiar with the extensive body of scientific research on the effects of MDMA, and had experience working with individuals who used MDMA. R. at 346.

III.

ALTERNATIVELY, EVEN IF REOPENING THE GOVERNMENT'S CASE WERE PROPER, SRA HOGANS' CONVICTION FOR DIVERS USE OF MDMA IN VIOLATION OF ARTICLE 112A, UCMJ, IS FACTUALLY AND LEGALLY INSUFFICIENT IN LIGHT OF THE LACK OF COMPETENT EVIDENCE DEMONSTRATING THAT MDMA IS A SCHEDULE I CONTROLLED SUBSTANCE.

Standard of Review

This Court reviews legal and factual sufficiency de novo. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Law

This Court may only affirm findings it determines are "correct in law and fact[.]" Article 66(d),UCMJ, 10 U.S.C. § 866(d) (2019).[9] The test for legal sufficiency "is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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." *United States v. Walters*, 58 M.J. 391, 395

[9] The timeframe charged for Specification 2 of the Additional Charge was between on or about 1 June 2020 and on or about 30 September 2020. ROT, Vol. 1, Charge Sheet. Therefore, the changes to this Court's factual sufficiency review brought by the National Defense Authorization Act of 2021 do not apply to the alleged divers use of MDMA. *See* Article 66(d)(1), 10 U.S.C. § 866(d)(1)(B) (2021).

(C.A.A.F. 2003) (emphasis omitted). A review 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." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

This Court's "unique power of review for factual sufficiency, however, is subject to a critical limitation. A Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *Walters*, 58 M.J. at 395 (citing *United States v. Smith*, 39 M.J. 448, 451 (C.M.A. 1994)). "In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, our unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016) (unpub. op.). This authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). Finally, this Court has the tremendous power to judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the fact finder. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (citing Article 66(c), UCMJ); *but see* 10 U.S.C. § 866(d)(1)(B) (2021) (changes to this Court's factual sufficiency review).

Analysis

The military judge erred when he did not dismiss the specification for divers use of MDMA due to a violation R.C.M. 917, and allowed the Government reopen its case to establish that MDMA was a Schedule I controlled substance. *See* Argument II, *supra*. But even if reopening the Government's case were allowable, the evidence is legally and factually insufficient to establish that MDMA is a Schedule I controlled substance as charged. As the military judge noted, the Government's case-in-chief lacked any evidence that MDMA was a Schedule I controlled substance. R. at 358. Despite being allowed to reopen its case, the Government presented one witness—SA JF—whose testimony was not competent to testify as to the nature of MDMA. During his testimony, SA JF testified that he had only taken normal criminal investigator training, which entailed only 4-5 days of training regarding drug use. R. at 370-71 Worse yet, he admitted that he had never investigated an MDMA case and had never taken any drug-specific courses as part of his training. *Id*. Notably, the Government did not attempt to offer him as an expert witness or present evidence of his qualifications. Thus, it is entirely unclear how SA JF was competent to testify as to MDMA's controlled substance schedule. *See United States v. Smith*, 34 M.J. 200 (C.M.A. 1992) (recognizing that a criminal drug investigator may "*in some circumstances*" be qualified to give expert testimony on the physical characteristics and identification of contraband drugs (emphasis added)). And given that the parties and the miliary judge agreed that the Government had not presented any evidence of

whether MDMA was a Schedule I substance as charged, Specification 2 of the Additional charge must be set aside for lack of competent evidence.

WHEREFORE, SrA Hogans respectfully requests this Honorable Court set aside Specification 2 of the Additional Charge.

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 Appellate Government Division on 25 April 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman (E-4) **CAMERON N. HOGANS.,** USAF Appellant.	))))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 1 No. ACM 22091 28 May 2024

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

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ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION IN LIMINE TO EXCLUDE PROSECUTION EXHIBIT 1, A VIDEO PURPORTING TO SHOW APPELLANT'S DRUG USE, WHEN THE GOVERNMENT DID NOT PROVIDE TO THE DEFENSE NOTICE OF OR ACCESS TO THE VIDEO UNTIL THE NIGHT BEFORE APPELLANT'S COURT-MARTIAL.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETIONAND ABANDONED HIS NEUTRAL ROLE WHEN HE ALLOWED THE GOVERNMENT TO REOPEN ITS CASE TO ESTABLISH A MISSING ELEMENT FOR SPECIFICATION 2 OF THE ADDITIONAL CHARGE.

III.

ALTERNATIVELY, EVEN IF REOPENING THE GOVERNMENT'S CASE WERE PROPER, WHETHER SPECIFICATION 2 OF THE ADDITIONAL CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT.

STATEMENT OF CASE

The United States agrees with Appellant's statement of the case. Appellant received Article 65(d) review on 14 November 2022. Thus, his court-martial was final under Article 57(c)(1) before the 23 December 2022 change to Article 66 that would purportedly give this Court jurisdiction over his court-martial. *See* Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022). The United States asserts that this Court has no jurisdiction to review Appellant's case, but recognizes this Court's contrary, published decision in United States v. Vanzant, ___ M.J. _____ (A.F. Ct. Crim. App. 28 May 2024). The United States

continues to assert this position regarding lack of jurisdiction in case of additional litigation at our superior Court.

STATEMENT OF FACTS

On 2 May 2022 Appellant pleaded not guilty to the Specifications of the Additional Charge relating to the divers use of lysergic acid diethylamide ("LSD"), and 3, 4 Methylenedioxymethamphetamine ("MDMA") in 2020. (R. at 90.)

During arraignment, trial defense counsel moved in limine to exclude evidence of a video montage, identified as Appellate Exhibit X, that had been noticed to defense counsel the previous evening. (R. at 17-20.) The evidence in question consisted of a one-minute and 43 second video montage with music that depicted Appellant, Airman Basic (AB) BAM, and three other individuals using drugs, including MDMA and LSD, at different times and locations. (R. at 30-32, 43.) The video montage depicted Appellant with LSD in his hands, the aftereffects of LSD on various individuals including Appellant and AB BAM, and a marijuana joint being passed from the Appellant's hand to AB BAM's hands. (App. Ex. X.) AB BAM had created this video montage on her phone and sent it to Appellant and one other individual on approximately 14 April 2020. (R. at 30.) AB BAM alerted trial counsel to the existence of this video the night before Appellant's trial on 1 May 2022. (R. at 40.)

AB BAM was a witness for the prosecution and testified pursuant to a grant of testimonial immunity. (R. at 25.) AB BAM had been subjected to court-martial for drug use with Appellant. (R. at 23-24.) As part of the investigation into her drug use, the Air Force Office of Special Investigation (OSI) seized her phone on 16 March 2021. (R. at 51.) OSI returned the phone to AB BAM approximately 11 days before trial on 22 April 2022. (Id.) While AB BAM's phone was in OSI's custody, OSI performed a data extraction using a

"Cellebrite" device. (R. at 54.) The Cellebrite device allowed OSI to download the content of AB BAM's phone to a digital storage device. (R. at 54-55.) However, the extraction of data from AB BAM's phone may not have been a complete extraction because OSI had limited storage due to information that had been downloaded from another phone. (R. at 54.)

At the time of the extraction AB BAM's phone was approximately five years old and contained 7,000 photos and 1,000 videos. (R. at 39.) OSI searched the phone's downloaded content pursuant to a search warrant and discovered images of different airmen appearing to use narcotics between 18 March and 14 April 2020. (R. at 56.) However, OSI did not discover any video montage that consisted of Appellant, AB BAM, and other individuals using various illegal drugs. (R. at 56.) Neither AB BAM's phone nor the downloaded Cellebrite content were provided to trial defense counsel. (R. at 79.) While AB BAM testified that she pulled the video montage from her phone the night before trial, there was no evidence at trial that the video montage was part of the Cellebrite data downloaded from AB BAM's phone. (R. at 40, 79.) While trial counsel was unaware of this particular video montage, trial counsel proffered that they had previously sent over multiple photos and another video from AB BAM's phone. (R. at 84.)

After receiving a grant of testimonial immunity in November 2021, AB BAM participated in approximately five to six interviews with trial counsel, (R. at 40.) However, AB BAM did not reveal the existence of the video montage until the evening before Appellant's trial. (R. at 40.) It was AB BAM's contact with trial defense counsel that prompted the disclosure of this video montage to trial counsel. (R. at 41.) Before trial and after AB BAM's phone had been returned, trial defense counsel asked AB BAM for a specific photo located on her phone. (Id.) AB BAM was not able to immediately search her phone because she was on leave. (Id.) When

she returned from leave, she searched the approximate 7,000 photos on her phone and could not find the photo requested by trial defense counsel. (Id.) She then searched her text messages to find the photo. (Id.) While she did not find the photo requested by trial defense counsel, she did find the video montage in question and believed it could be of use to the prosecution; as a result, she contacted her attorney and sent the video. (Id.) Trial counsel received the video from AB BAM the night before trial on 1 May 2022 and provided it to trial defense counsel within 15 to 20 minutes of receipt. (R. at 86.)

Trial defense counsel's objection to the video montage was based in part on a discovery violation because AB BAM's phone had been in the government's possession for over a year. (R. at 20.) And, prior to trial, trial defense counsel submitted its discovery request and requested the following:

> e. Access to, copies of, and a descriptive list of any physical evidence or photographs, in the Government's custody or control, seized, recorded, or reviewed during this investigation of this case, whether relied upon in charging or not. A list/copy of documents and other real evidence and location the Government intends to use at any trial findings, or presentencing including rebuttal. This includes the substance of any conversations which occurred that contained any evidence not disclosed under another paragraph.
>
> f. Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities and are material to the preparation of the Defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief or presentencing, or were obtained from or belong to the Accused. R.C.M. 70l(a)(2)(A). Please provide copies of any photographs taken to include the alleged crime scene and witnesses, if any.
>
> g. Disclosure of the existence of and copies of any audio/visual representations or renditions in the possession of any governmental agency or employee which could have any bearing whatsoever on this case. This includes those which may later become discoverable under the Jencks Act, l8 U.S.C. [§] 3500.

(App. Ex. XII.)

The military judge denied trial defense counsel request to exclude the video because of a discovery violation. (App. Ex. XVI at 13.) He found that the defense had not met is burden to show that the Government's failure to provide the video prior to 1 May 2022 constituted a discovery violation. (Id.) While the military judge noted that the discovery requests were broad enough to cover the type of evidence in Appellate Exhibit X, a video, the requests did not provide enough specificity that the trial counsel, through the exercise of due diligence where to look for it. (Id. at 11.) The military judge continued:

> Even if the Defense's request was specific enough to alert the trial counsel to look for the video in a phone of one of its witnesses in OSI's possession, such that a discovery violation occurred, the Court finds the remedy of exclusion to be too severe considering the circumstances of the late disclosure.
>
> Trial counsel was unaware of the video's existence until 1 May 2022, when AB BAM essentially volunteered it. The reason for the late discovery the witness searching for the video and voluntarily providing it following pretrial interviews. *Even if a discovery violation occurred,* the truth finding function of a court-martial would not be served by exclusion of this evidence. A more appropriate remedy, if any, would be a continuance to permit Defense more time to respond to the newly discovered evidence. However, the *Defense expressly declined a continuance as a remedy, as the Defense has an interest in a speedy resolution of trial*.

(Id. at 11-12.) (emphasis added)

AB BAM was the only fact witness for the prosecution. (R. at 25.) She testified at trial that she witnessed Appellant orally ingest a pill of MDMA on one occasion and snort a pill on another occasion. (R. at 287.) She also testified that she witnessed Appellant use LSD and that she witnessed it in his hand before he put it in his mouth. (R. at 284-285.) AB BAM testified as to the effects of both LSD and MDMA. (R. at 293-294.) During cross examination, trial defense counsel raised the fact that AB BAM was testifying under a grant of testimonial immunity and

had been subject to only a summary court martial, was not discharged, and did not receive a federal conviction for any offense. (R. at 295.)

At the conclusion of the Government case, the military judge raised a motion pursuant to R.C.M. 917 because trial counsel had failed to provide evidence that MDMA was a schedule I controlled substance. (R. at 358.) After providing both sides with an opportunity to be heard, the military allowed trial counsel to re-open its case and present evidence with respect to MDMA's scheduling. (R. at 363.) The military judge made no suggestion and offered no advice with respect to how such evidence could or should be presented. Trial counsel called, an OSI agent, Special Agent (SA) JA, who testified that MDMA is a schedule I controlled substance on the Drug Enforcement Agency's list of controlled substances. (R. at 370.) Trial defense counsel did not object to SA JA's testimony.

ARGUMENTS

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION IN LIMINE TO EXCLUDE PROSECUTION EXHIBIT 1, A VIDEO PURPORTING TO SHOW APPELLANT'S DRUG USE.

Standard of Review

A military judge's discovery rulings and choice of remedy for discovery violations is reviewed for an abuse of discretion. United States v. Vargas, 83 M.J. 150, 153 (C.A.A.F. 2023); United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015). A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the

range of choices reasonably arising from the applicable facts and the law. Vargas, 83 M.J. at 153.

Law and Analysis

Trial defense counsel's discovery request, Appellate Exhibit XII, was broad enough to include either an inspection of AB BAM's phone or an inspection of the Cellebrite data derived from it. Rules for Court Martial 702 provides:

> After service of charges, upon request of defense, the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authority and the
>
> (i) item is relevant to defense preparation;
> (ii) government intends to use the item in the case-in-chief at trial;
> (ii) government anticipates using the item in rebuttal; or
> (iii) item was obtained from or belongs to the accused.

R.C.M. 702(a)(2)(A).

Among other items, trial defense counsel requested photographs, tangible objects, copies of any audio-visual representations in the possession of any government agency which could have any bearing on this case whatsoever. (App. Ex. XII.) The contents of AB BAM's phone had a bearing on Appellant's case. AB BAM was the Government's only fact witness who testified against Appellant at his trial. (R. at 262-299.) She testified that she used drugs with Appellant and had taken photographs of illegal drugs and their illegal drug use. (R. at 280.) Trial counsel knew that at least some of the photos and videos on AB BAM's phone had a bearing on Appellant's case because some photos and a video from AB BAM's phone had been previously discovered to trial defense counsel. (R. at 84.) Moreover, the video montage was only discovered because trial defense counsel had requested that AB BAM locate a specific

photo on her phone after it had been returned by OSI. (R. at 41.) Therefore, pursuant to trial defense counsel's discovery request and the requirements under R.C.M. 701(a)(2)(A), trial counsel had a duty to either provide trial defense counsel with access to AB BAM's phone or to a copy of its contents.

The failure of trial counsel to provide either access to AB BAM's phone or a copy of the data extracted from it therefore represented a violation of trial counsel's obligation to provide discovery to Appellant under R.C.M. 701(a)(2)(A). But even if the government had turned the Cellebrite data over to the defense or had allowed the defense to inspect the physical phone, that did not mean that the defense would have become aware of the video in question. OSI's own review of the Cellebrite data did not reveal the existence of this video, and there is no evidence that the video was actually part of the Cellebrite data. (R. at 56.)

Moreover, under the circumstances of this case, the most appropriate remedy, if any, would have been a continuance – an option proposed by the military judge but rejected trial defense counsel. (R. at 79.)

When a military judge finds that a party has failed to comply with their discovery obligations, the military judge may take one or more of the following actions:

> (A) Order the party to permit discovery;
> (B) Grant a continuance;
> (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed;
> (D) Enter such other order as is just under the circumstances.

R.C.M. 701(g)(3).

> Factors to be considered in determining whether to grant an exception to exclusion under subsection (3)(c) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors.

R.C.M. 701(g)(3), Discussion

The facts of each case must be individually evaluated to determine an appropriate remedy for a violation of the discovery mandate. United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993). Even intentional nondisclosure of discoverable evidence does not inevitably require as a sanction that the evidence be excluded. United States v. Trimper, 28 M.J. 460, 469 (C.M.A.), *cert. denied*, 493 U.S. 965, 107 L. Ed. 2d 374, 110 S. Ct. 409 (1989). See also United States v. Callara, 21 M.J. 259, 263 (C.M.A. 1986) (even if trial counsel willfully failed to disclose a statement prior to appellant's arraignment, military judge was still free to determine that it would be "in the interests of justice" to admit the statement when the statement demonstrated that appellant had lied as witness.)

There was no evidence that the military judge failed to consider the correct law or that the military judge abused his discretion when he allowed trial counsel to admit the video evidence over defense objection. Under the circumstances of this case exclusion was not the appropriate remedy. There was no evidence of bad faith or gamesmanship. This is not the case where trial counsel sought to ambush Appellant by purposely withholding evidence from him in hopes that he would be able undercut claims made Appellant's potential testimony. That trial counsel had no knowledge of the video montage is supported by AB BAM's testimony in that she only disclosed the existence of the video to trial counsel the evening before trial. (R. at 40-41.) Additionally, OSI's review of the Cellebrite data did not reveal the existence of this video and there is no evidence that the video was actually part of the Cellebrite data. (R. at 56.) Therefore, had AB BAM not alerted trial counsel to the existence of this video, it never would have been offered into evidence. Accordingly, there is no evidence that OSI or trial counsel purposely

withheld this evidence to gain any advantage at trial. On the contrary, trial counsel disclosed this video to defense counsel within minutes of receiving it. (R. at 86.)

Appellant asserts the video evidence amounted to an "unfair disadvantage" that required defense counsel to alter its strategy and argument to respond to a video of Appellant purporting to use LSD. (App. Br. at 13-14.) However, Appellant provided no alternate strategy, and it is unclear how this evidence caused trial defense counsel to change its strategy because the video evidence was consistent with AB BAM's anticipated testimony - in that she and Appellant used LSD together. (R. at 284-285.) This evidence did not cause AB BAM to alter her testimony in any way or the government to call any additional fact witnesses; it only served to bolster AB BAM's anticipated testimony.

Appellant further asserts that the short amount of time that he had to review the video evidence was insufficient to properly explore the new evidence. (App. Br. 14.) Appellant cannot have it both ways. At trial, defense counsel rejected the military judge's suggestion of a continuance in favor of "swift justice." (R. at 80.) Appellant should not be able to now use the lack of a continuance, a remedy he rejected, as a sword to have the evidence excluded from trial. It is also unclear how a continuance would have benefitted Appellant. With this additional evidence, the Government, not the Appellant, was in a position to perfect its case because the government had arguably identified additional witnesses who could testify about Appellant's illegal drug use.

Any disadvantage was further mitigated by the fact that Appellant presumably had knowledge of and access to this evidence such that its production should not have been a surprise because the video in question had been previously sent by AB BAM to Appellant as part of a group-chat/text message. (R. at 40.) There is no discovery violation if the defendant knew or

should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source. *See* United States v. Behenna, 70 M.J. 521, 529 *citing* Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000) Unlike the trial counsel, Appellant had knowledge of the video and also knew that it might be in the government's possession. On the other hand, trial counsel was unaware of this evidence until AB BAM brought it to his attention one day before the trial. (R. at 50.) At which point, trial counsel turned it over to defense counsel without delay. As a result, any disadvantage was mitigated by Appellant's prior knowledge of the video in question.

Notwithstanding the existence of a discovery violation, this Court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial. United States v. Luke, 69 M.J. 309, 320 (C.A.A.F. 2011). The alleged discovery violation in this case was not prejudicial. The video evidence did not reveal new matters or additional misconduct but was instead consistent with AB BAM's anticipated in-court testimony - that Appellant used LSD. (R. at 53.) Notably, AB BAM's testimony alone was sufficient to support a finding that Appellant used LSD. The testimony of only one witness may be enough to meet the government's burden so long as the members find that the witness's testimony is relevant and is sufficiently credible. United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006). The video was disclosed before trial and before any evidence had been presented to the finder of fact. In other words, this evidence did not cause trial defense counsel to change strategies mid-way through trial and lose credibility with the members or miss the opportunity to challenge a witness's credibility. Again, any perceived prejudice or disadvantage could have been mitigated with a delay, a solution that was rejected by trial defense counsel. (R. at 109.)

In sum, there was no evidence to suggest that the military judge abused his discretion when he admitted the video evidence over the defense counsel's objection. There was no evidence that the military judge's findings of fact were clearly erroneous or that his decision on remedy was influenced by an erroneous view of the law. There was no evidence of bad faith or that trial counsel purposely delayed in providing this evidence to defense counsel. Appellant has also failed to articulate how this video caused a change in his trial strategy. The only disadvantage Appellant points to is that he needed more time (a continuance) to interview the other participants in the video – a remedy rejected by trial defense counsel in favor of "swift justice." Moreover, any disadvantage is mitigated by the fact Appellant was likely aware of this video in that he had previously received it via text message from AB BAM. Finally, there is no evidence that this evidence was prejudicial because it was disclosed prior to arraignment, opening statements, presentation of evidence and consistent with AB BAM's anticipated testimony. Accordingly, this Court should deny this assignment of error. .

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION OR ABANDON HIS NEUTRAL ROLE WHEN HE ALLOWED THE GOVERNMENT TO REOPEN ITS CASE TO ESTABLISH A MISSING ELEMENT FOR DIVERS USE OF MDMA.

Standard of Review

When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of the trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions. United States v. Quintanilla, 56 M.J. 37, 78 (C.A.A.F. 2001) (quoting United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000)). A military judge's

decision on whether to reopen a case is reviewed for abuse of discretion. R.C.M. 913(c)(4); *See also* United States v. Satterley, 55 M.J. 168, 169 (C.A.A.F. 2001).

Law

A military judge is entitled to a "strong presumption" of impartiality, particularly when the actions at issue took place in conjunction with judicial proceedings. Quintanilla, 56 M.J. at 44. A military judge may, as a matter of discretion, permit a party to reopen its case after it has rested. R.C.M. 913(c)(4). This flexible standard originated in earlier Manual provisions which sought, *inter alia*, to avoid the granting of motions for finding of not guilty where available evidence had not been presented by the prosecution. United States v. Ray, 26 M.J. 468, 470 (CMA 1987) (citing Drafter's Analysis, Manual for Courts-Martial, United States, A 21-55. (1969ed.)(MCM)).

R.C.M. 917 provides the following:

> *In general*. The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but prior to entry of judgment if the evidence is insufficient to sustain a conviction of the offense affected…

R.C.M 917(a)

> *Procedure*. Before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte,* the military judge shall give each party an opportunity to be heard on the matter.
>
> For a motion made under R.C.M. 917(a), the military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion before findings on the general issue of guilt are announced.

R.C.M. 917(c) and its Discussion.

Sua sponte, means that the person involved acts on that person's own initiative, without the need for a request, motion, or application. R.C.M 103(19). Ordinary rules of statutory

construction apply in interpreting the R.C.M. United States v. Tyler, 81 M.J. 108, 113 (C.A.A.F. 2021). It is a general rule of statutory construction that if a statute is clear and unambiguous — that is, susceptible to only one interpretation — the court uses its plain meaning and applies it as written. Id. In this case R.C.M. 917(a) permits either the military judge or the defense counsel to raise of motion for a finding of not guilty.

a. The military judge properly allowed trial counsel to reopen his case to introduce available evidence that MDMA was a Schedule I Controlled Substance.

The military judge acted in accordance with R.C.M. 917(a) when he *sua sponte* raised a motion for a finding of not guilty. (R. at 77.) Appellant asserts that the text of R.C.M. 917 is unclear as to whether the military judge can *sua sponte* raise a motion and looks to the Federal Rule of Criminal Procedure in support of his position that only the trial defense counsel may raise a motion under R.C.M. 917. (App. Br. at 16.) R.C.M. 917 is neither unclear nor ambiguous, and as a result, its plain language (and not the Federal Rules of Criminal Procedure) controls its interpretation. *See* Tyler, 81 M.J. at 113.

R.C.M. 917(a) provides that in general, the military judge, on motion by the accused or *sua sponte,* shall enter a finding of not guilty if the evidence is insufficient to sustain a conviction. R.C.M. 917(a). *Sua sponte* means that the person involved (the military judge) acts on that person's own initiative, without the need for a request, motion, or application. R.C.M 103(19). In other words, the military judge may act on his or her own to make a motion without the need for trial defense counsel to first raise the issue. R.C.M. 917(a) If trial defense counsel or the military judge raise the motion, R.C.M. 917(b) and (c) dictate the form of the motion and the procedure.

The military judge followed the procedures articulated in R.C.M. 917(b) and (c). Section (b) provides that the motion shall specifically indicate where in the evidence is insufficient.

R.C.M. 917(b). The military judge complied with this section when he stated that no evidence had been offered that the substance, as charged, was a schedule one controlled substance. (R. at 77.) Before ruling on the motion and in accordance with R.C.M. 917(c), the military judge provided trial defense counsel and trial counsel an opportunity to be heard on the matter. (R. at 77.) After hearing from counsel, the military judge exercised his discretion, consistent with R.C.M. 913(c)(4) and the discussion to R.C.M 917(c) and allowed trial counsel to reopen his case to provide the evidence. (R. at 77) Notably, R.C.M. 913(c)(4) was designed for this type of situation - to avoid the granting of motions for finding of not guilty where available evidence had not been presented by the prosecution. See Ray, 26 M.J. at 470 (citing Drafter's Analysis, MCM, A 21-55. (1969ed.)(MCM)) The necessary evidence was readily available. Trial counsel did not request a delay and instead called an available witness to cure the deficiency in proof. (R. at 77.) Trial counsel could have just as easily asked that the military judge take judicial notice of the fact that the substance was a scheduled I controlled substance. *See* United States v. Paul, 73 M.J. 274, 279 (C.A.A.F. 2014) (at the trial level, Government could have requested the military judge to take judicial notice that Ecstasy is a Schedule I controlled substance). As a result, the military judge's actions in raising the motion and thereafter were consistent with the R.C.M.s.

Appellant recognizes that R.C.M. 913(c)(5) permits the military judge to allow a party to reopen its case but asserts that trial counsel should proffer some reasonable excuse for its request. (App. Br. at 16.) However, R.C.M. 913(c)(5) does not mandate that a reasonable excuse be part of the record; and in this case, a review of the record makes it clear that the failure to offer the evidence was an oversight by trial counsel. This finding is supported by the ease with which trial counsel could have offered the evidence. In addition to calling a witness or requesting judicial notice, trial counsel could have simply asked the defense forensic expert on

cross examination to meet the evidentiary requirement. (App. Br. at 17-18.). Therefore, while not necessary, the record makes clear that the failure to offer the evidence was an oversight.

Permitting trial counsel to reopen his case did not represent an abuse of discretion. There is no evidence that the military judge based his decision off an erroneous fact or that his decision was influenced by an erroneous view of the law. On the contrary, the military judge followed R.C.M. 917 and R.C.M. 913. And lastly, the military judge's decision on the issue at hand was not outside the range of choices reasonably arising from the applicable facts and the law. It was a technical oversight by trial counsel that would have resulted in a windfall for Appellant. Moreover, there was nothing unfair about the military judge's decision. It had no impact on trial defense counsel's theory of the case and did not delay the trial.

In sum, the military judge properly raised a motion *sua sponte* pursuant to R.C.M. 917. After raising the motion, he followed the procedures outlined by R.C.M. 917(b) and (c). While the military judge did not require trial counsel place a reason for the not previously offering evidence that MDMA was a schedule I controlled substance, the reason is apparent from the record and not required by law. As a result, the military judge properly allowed trial counsel to reopen its case and cure the evidentiary deficiency.

b. Allowing trial counsel to reopen his case and provide available evidence relating to a technical element of the offense did not cause the military judge to abandon his neutral role.

Appellant asserts that the military judged abandoned his neutral role because he did not inquiry into the reasoning why the Government did not present sufficient evidence to establish all the elements of the charged offense before allowing the Government to reopen its case. (App. Br. at 17.) The military judge did not abandon his neutral role because no such inquiry is required. The procedures for R.C.M 917 allowed for each party to be heard on the matter, but

there was no requirement that the military judge grill counsel to come up a reasonable excuse. R.C.M. 917(c); *See also* United States v. Ray, 26 M.J. 468, 472 (C.M.A. 1988) (a party moving to reopen its case *should* proffer some reasonable excuse for its request to reopen its case) (emphasis added); *see also* United States v. Kelm, 827 F.2d 1319, 1323 (9th Cir. 1987) (defendant allowed to reopen case to admit documents that he "forgot" to offer during case in chief).

While trial counsel did not provide an explanation on the record, he immediately provided a solution, in the form of witness testimony from an OSI agent, to provide the missing evidence. (R. at 467.) Given trial counsel's proposed solution and the ease with which he could have established this information, either through cross-examination of the defense forensic psychologist who testified extensively about MDMA, or through judicial notice, common sense suggests that trial counsel merely forgot to offer this technical piece of evidence during his case in chief. (R. at 415.) That the military judge did not make trial counsel state that he "forgot" to admit this evidence on the record, does not mean the military judge abandoned his neutral role. Instead of expressing any partiality, the record demonstrated that the military judge was more concerned with moving the case along and not providing a technically deficient case to the members for deliberation when the real issue concerned witness credibility. (R. at 415-417.) During closing argument, trial defense counsel's strategy had nothing to do with the technicality of whether MDMA was a schedule I controlled substance, but rather whether the sole witness for the Government was credible. (R. at 500-508.) As a result, the military judge's decision not to belabor trial counsel's negligence is not evidence that he abandoned his neutral role, but rather that he wanted the members to focus on the true issues before the court.

Appellant also asserts that the military judge abandoned his neutral role when he allowed a witness with no experience with MDMA cases or specialized training to testify that it was a schedule I controlled substance. (App. Br. at 18.) The military judge did not abandon his neutral role because he provided no suggestion or direction as how to remedy the deficiency in proof. (R. at 463-464.) And while allowing trial counsel to call an OSI agent to establish this classification was a viable way to present this proof, it represented the least favorable/economical method to prove this element. The agent had no experience or training with MDMA and remained subject to cross examination about this inexperience. Instead of watching trial counsel struggle through such testimony, the military judge, on his own, could have taken judicial notice of the fact that MDMA was a schedule I controlled substance under the law. *See* M.R.E. 202. However, aside from raising and following the requirements R.C.M. 917, the military judge provided trial counsel no assistance in presenting its evidence and therefore did not abandon his neutral role.

In sum, the military judge properly applied R.C.M. 917 when he identified a deficiency in proof. He closely followed its procedures, and although he did not require trial counsel put a reason for re-opening his case on the records, such a reason clear was from the record and not required. Allowing the OSI agent to testify about the scheduling of MDMA was a permissible way to offer evidence and required no special experience or training. While the military judge could have simply taken judicial notice of the fact that it was a schedule I controlled substance, the military judge offered no assistance or suggestion as to how to present such evidence. As a result, the military judge did not abandon his judicial role. Accordingly, this Court should reject this assignment of error.

III.

APPELLANT'S CONVICTION FOR DIVERS USE OF MDMA IN VIOLATION OF ARTICLE 112A, UCMJ, IS FACTUALLY AND LEGALLY SUFFICIENT BECAUSE THE EVIDENCE ESTABLISHED APPELLANT'S WRONGFUL USE OF MDMA, A SCHEDULE I CONTROLLED SUBSTANCE.

Standard of Review

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

Law

Wrongful use of a controlled substance in violation of Article 112a, UCMJ requires these elements: (1) That the accused used a controlled substance; and (2) That the use by the accused was wrongful. Manual for Courts-Martial, pt. IV, para. 50.b.2 (2019 ed.) (MCM)

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v.Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd, 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of

fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (citations omitted). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

Analysis

Appellant's conviction for the use of MDMA is legally sufficient. AB BAM testified that she witnessed Appellant use MDMA between the periods of 1 June and 30 September 2020. (R. at 286.) AB BAM testified as to the color of the pill and that Appellant had on one occasion snorted the pill and on another taken it in pill form. (R. at 286-287.) She described the effects of the MDMA as making her very emotional. (R. at 294.) During trial there was no evidence offered that Appellant's used was not wrongful or that he was unaware that he was using MDMA. During trial, an OSI agent, Special Agent (SA) JA testified that 3,4-Methylenedioxy methamphetamine (MDMA) is a schedule I controlled substance on the Drug Enforcement

Agency's list of controlled substance. (R. at 370) This testimony is consistent with chapter 21 United States Code, Section 812, which lists 3,4-Methylenedioxy methamphetamine as a schedule I controlled substance. 21 U.S.C. § 812.

Appellant failed to object to SA JF's testimony at trial. Appellant now asserts that SA JF's testimony was insufficient to establish MDMA as a schedule I controlled substance and relies on United States v. Smith, 34 M.J. 200 (C.M.A. 1992) (App. Br. at 21.) Such reliance is misplaced because Smith stands for the proposition that an investigator may in some circumstances be qualified to provide *expert* testimony. Smith, 34 M.J. at 202 (emphasis added). However, in this case SA JF's testimony required no expertise, and he did not offer an opinion; his testimony was limited to the fact that MDMA was a schedule I controlled substance. (R. at 370-371.) As a result, SA JF's experience with MDMA, or the fact that he never investigated an MDMA case is irrelevant.

The government presented evidence with no objection, that MDMA was a schedule I controlled substance. If Appellant had concerns about the government's mode of admitting the fact into evidence, he should have objected at that point. He did not, and the fact was squarely on the record before the trier of fact. Therefore, the finding that MDMA was a schedule I controlled substance was both legally and factually sufficient.

CONCLUSION

The United States respectfully requests this Honorable Court deny Appellant's claims and affirm the sentence in this case.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 28 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME**
Appellee	)	**OUT OF TIME**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 22091
CAMERON N. HOGANS	)	
United States Air Force	)	29 May 2024
	)	
Appellant	)	

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

Pursuant to Rule 23.3(m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file a reply to the Government's answer out of time. The Government submitted its answer on 28 May 2024. Pursuant to Rule 18(d), Appellant's reply to the Government's brief is due on 4 June 2024. Appellant requests that this Court allow him additional time to file his reply brief by 21 June 2024. This is Appellant's first enlargement of time to file his reply brief.

The record of trial was docketed with this Court on 29 August 2023. From the date of docketing to the present date, 274 days have elapsed. On the date requested, 297 days will have elapsed.[1]

[1] A description of Appellant's charges, specifications, and sentence is contained in Appellant's brief, submitted to this Court on 25 April 2024. Appellant's Record of Trial (ROT) is 4 volumes, and the transcript is 448 pages. There were 6 motions filed. There are 4 prosecution exhibits, 5 defense exhibits, and 21 appellate exhibits. Appellant is no longer in confinement.

The basis for Appellant's request is that his lead counsel, Colonel Anthony Ortiz, will be unable to sufficiently review and respond to the Government's answer due to his current military orders and subsequent civilian work commitments. Currently, Col Ortiz is on temporary duty (TDY) from 20 May to 7 June 2024 at the Army JAG School, Charlottesville, Virginia. As such, he will be performing full duty days under his current orders and does not currently have access to the entire record of trial. Further, upon return of the TDY, Col Ortiz has numerous civilian, professional obligations due to his three-week absence as a trial attorney at the Department of Justice. The requested deadline will ensure to ensure Col Ortiz has adequate time to review the Government's brief and draft an appropriately responsive reply. This is Col Ortiz's first priority for his Air Force docket.

The requested enlargement is out of time pursuant to Rule 23.3(m). Good cause exists for filing this motion out of time. In light of the filing of the government's brief be filed later in the day on 28 May 2024, undersigned counsel did not become aware of the Government's filing until the morning of 29 May 2024—6 calendar days prior to the Appellant's due date for his reply.

Appellant is unaware of this requested enlargement but has consented to previous requests and has further empowered undersigned counsel to seek enlargements of time on his behalf, where necessary. Appellant understands his rights to counsel and timely appellate review.

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

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 Appellate Government Division on 29 May 2024.

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31 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CAMERON N. HOGANS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME - OUT OF TIME ACM 22091 Panel No. 1

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

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

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Senior Airman (E-4) **CAMERON N. HOGANS**, United States Air Force, *Appellant*	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel 1 No. ACM 22091 Filed on: 21 June 2024

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

This case involves both the Government's acknowledged discovery error and a gap in the Rules for Court-Martial ("R.C.M.") 917 that the military judge used to aid the Prosecution to establish the elements of its case. In its response, the Government admits to two important points: 1) that the Prosecution's failure to provide Prosecution Exhibit 1 to the Defense amounted to a discovery violation of a specific defense request under R.C.M. 701(a)(2)(A); and 2) trial counsel simply forgot to admit evidence of evidence of the Schedule of 3,4 methylenedioxymethamphetamine ("MDMA") during its case-in-chief and proffered no reason for the error. Answer to Assignments of Error (Govt Answer) at 8, 17.[1] Both errors warrant set aside of the Specifications of the Additional Charge.

[1] This reply will address the Government's response to Issues I and II to SrA Hogans' Assignment of Errors (AOE), filed on 25 April 2024. For Issue III, SrA Hogans will stand on the briefing in the AOE.

A. The Government's acknowledgement that the Prosecution violated the Defense's specific discovery request shifts the burden to the Government to prove that the error was harmless beyond a reasonable doubt

The Government concedes that the Prosecution violated its discovery obligation under R.C.M. 701(a)(2)(A). Govt Answer at 8. And the Government Answer admits: 1) that the defense made a specific request to the Government for the category of evidence that Prosecution 1 falls into; and 2) that despite the video being disclosed the day before trial that the evidence represents a failure to comply with the Defense's request by the Prosecution. *Id.* at 7-8.

In light of the Government's concession of error, the established case law holds that the Government now has the burden to prove harmless beyond a reasonable doubt for failure to comply with defense's discovery request. *See United States Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (cases in which the defense made a specific request for the undisclosed favorable information requires a heightened constitutional harmless beyond a reasonable doubt standard); *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990). And such a failure to disclose evidence pursuant to a specific request "is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (quoting *Coleman*, 72 M.J. at 187).

The Government misunderstands the burden in this case and fails to show that the error was harmless beyond a reasonable doubt. Govt Answer at 10-11.[2] The Government only briefly addresses prejudice in its answer and asserts that the discovery violation was not prejudicial because "[t]he video evidence did not reveal new matters or additional misconduct but was instead consistent with AB BAM's anticipated in-court testimony—that Appellant used LSD." *Id.* at 11. The Government assumes that "this evidence did not cause trial defense counsel to change strategies mid-way through trial and lose credibility with the members or miss the opportunity to challenge a witness's credibility." *Id.*

The Government's unsupported assumption is without merit. The members were presented a video purporting to be SrA Hogans using LSD–the very crime that is the subject of Specification 1 of the Additional charge. The Government presented one fact witness in its case-in-chief, whose credibility had been severely undermined because it was shown that she was testifying under a grant of testimonial immunity and had been subjected to only summary court-martial for similar drug use. R. at 23-25. To suggest Prosecution Exhibit 1 did not have any effect on the fact finder's finding of guilt would strain credulity.

Moreover, the Government cannot merely rely on the military judge's determination that the remedy of exclusion was too severe, even assuming arguendo

[2] The Government also posits that the Defense asserted "no alternative strategy" in its case or that SrA Hogans "presumably had knowledge and access to this evidence such that its production should not have been a surprise" because the witness had previously sent the video as part of a group-chat/test message. Govt Answer at 10. These arguments amount to impermissible burden shifting.

that the defense proffered a specific discovery request. App. Ex. XVI at 11. A military judge's findings should be afforded little to no weight when they are influenced by an erroneous view of the law. *United States v. Stellato*,74 M.J. 473, 480 (C.A.A.F. 2015).[3] And here, as the Government's concession discussed above agrees, the military judge erred in determining that no violation of R.C.M. 701(a)(2)(A) occurred and did not apply the correct test for prejudice—the Government's error was harmless beyond a reasonable doubt. Accordingly, the military judge's findings should be afforded little weight in this case.

WHEREFORE, SrA Hogans requests that Specification 1 of the Additional Charge be set aside.

B. The military judge improperly used R.C.M. 917 as a mechanism for the Prosecution's lack of due diligence to establish the elements for Specification 2 of the Additional Charge

The military judge abused his discretion when he allowed the Government to reopen its case to allow the Government to establish a missing element for Specification 2 of the additional charge under R.C.M. 917. When a party moves to

[3] The Government also argues that "there was no evidence that the military judge failed to consider the correct law or that the military judge abused his discretion when he allowed trial counsel to admit the video evidence over defense objection." Govt Answer at 9. Yet, the Government admits that "[t]he failure of trial counsel to provide either access to AB BAM's phone or a copy of the data extracted from it therefore represented a violation of trial counsel's obligation to provide discovery to Appellant under R.C.M. 701(a)(2)(A)." *Id*. at 8. This seems to be directly contrary to the military judge's findings that the defense had not met is burden to show that the Government's failure to provide the video prior to 1 May 2022 constituted a discovery violation because "the Defense broadly requested discovery in many forms of evidence that would reasonably encompass the video contained in Appellate Exhibit X… [but] has not demonstrated the evidence was requested with sufficient precision to enable trial counsel to locate it." App. Ex. XVI. at 11.

reopen evidence, it raises potential concerns that the party did not exercise due diligence, or worse, is potentially "sandbagging" the court. *See United States Barrett*, 2019 CCA LEXIS 96, at *4-5 (Army Ct. Crim. App. Mar. 5, 2019) (citing *United States v. Fisiorek*, 43 M.J. 244, 247 (C.A.A.F. 1995); *United States v. Ray*, 26 M.J. 468, 473 (C.M.A. 1988) (Everett, C.J., concurring)).

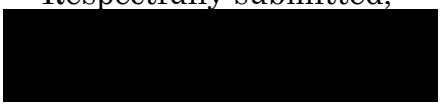
Here, there is simply no reason of record for why the Prosecution failed to present evidence of all the elements of its charged offense, Yet, the military judge not only identified the issue but failed to conduct an inquiry as to the Prosecution's failure to exercise due diligence in prosecuting its case. R.C.M. 917's purpose is not to aid the Government in establishing its elements. And the is error was compounded by the military judge' *sua sponte* raising the motion to reopen on behalf of the Government. *See* R. at 359 ("A discussion following that portion of the rule, which is RCM 917(c) says, for a motion made under RCM 917(a), the military judge ordinarily should permit the trial counsel to reopen the case as to its insufficiency specified in the motion, before findings on the general issue of guilt are announced.").

R.C.M. 917 was not designed as a conduit to correct the Government's errors. Contrary to the Government's argument, R.C.M. 917 is based off of Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 29. *See Manual for Courts-Martial, United States* (2016 ed.), App 21-66 (This subsection is based on Fed. R. Crim. P. 29(a) and on the first two sentences of paragraph 71 *a* of MCM, 1969 (Rev.)). And Fed. R. Crim. P. 29(a) only provides that "[t]he court may on its own consider whether the evidence is insufficient to sustain a conviction." The Federal rule does not allow the

court to *sua sponte* reopen the case to allow the Government's to establish the elements based on a lack of due diligence. *See id.*; *see also United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020) (finding that the federal courts' interpretation of an identical rule to a Military Rule of Evidence was "instructive"). Nor is the military judge's power to "correct" the Government's failure to meet its elements under R.C.M. 917 as clear-cut as the Government claims. The plain language of R.C.M. 917(a) states: "The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but prior to entry of judgment if the evidence is insufficient to sustain a conviction of the offense affected." The Government relies on the analysis of R.C.M. 917 to justify the reopening of the case. But this language is not binding on this Court. Moreover, the plain language of R.C.M. 917 allows the military to *sua sponte* enter a finding of not guilty, not *sua sponte* raise a motion to reopen on behalf of the Government. *See United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) ("It is a well established rule that principles of statutory construction are used in construing the *Manual for Courts-Martial* in general and the Military Rules of Evidence in particular."). Thus, the military judge erred when he *sua sponte* raised a motion for the Prosecution to reopen its case for the sole purpose, without good reason or excuse, of curing the Prosecution's lack of diligence.

WHEREFORE, SrA Hogans respectfully requests this Honorable Court set aside Specification 2 of the Additional Charge.

Respectfully submitted,



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I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial & Appellate Operations Division on 21 June 2024.

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