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

| | |
|---|---|
| **UNITED STATES** | **) MOTION FOR ENLARGEMENT** |
| | **) OF TIME (FIRST)** |
| *Appellee*, | ) |
| | ) Before Panel No. 2 |
| v. | ) |
| | ) ACM 40282 |
| | ) |
| Staff Sergeant (E-5) | ) Filed on: 12 July 2022 |
| **CODY R. JENNINGS,** | **)** |
| USAF, | **)** |
| | **)** |
| *Appellant*. | ) |

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

Pursuant to Rules 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant SSgt Cody R. Jennings hereby moves for the first enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 20, 2022. SSgt Jennings's brief is currently due on July 19, 2022. SSgt Jennings requests an enlargement for a period of 60 days, which will end on September 17, 2022. On the date requested, 120 days will have elapsed from the date of docketing. 53 days have elapsed from the date the record of trial was received to the present day. SSgt Jennings is currently confined.

On November 3, 2021, and February 2, 2022, SSgt Jennings was tried by a military judge sitting alone at a general court-martial at Joint Base San Antonio-Lackland, Texas In accordance with his pleas, SSgt Jennings was convicted of: one Charge and four specifications of broadcasting intimate visual images without consent in violation of Article 117A, Uniform Code of Military Justice (UCMJ); one Charge and four Specifications of extortion in violation of Article 127, UCMJ; and one Charge and one specification of assault, in violation of Article 128,

UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

Through no fault of SSgt Jennings, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,

[redacted]
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on July 12, 2022.

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

13 July 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40282<br><br>Panel No. 2 |

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 July 2022.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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

| | | |
|---|---|---|
| **UNITED STATES** | ) | **MOTION TO EXAMINE** |
| *Appellee* | ) | **SEALED MATERIALS** |
| | ) | |
| v. | ) | Before Panel No. 2 |
| | ) | |
| Staff Sergeant (E-5) | ) | No. ACM 40282 |
| **CODY R. JENNINGS** | ) | |
| United States Air Force | ) | 18 August 2022 |
| *Appellant* | ) | |

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following exhibits included in Appellant's record of trial:

| **Exhibit Number** | **Description** |
|---|---|
| | **Appellate Exhibits (ordered sealed by the military judge)** |
| VI | Notice and Motion to Admit Evidence Under MRE 412, 9 pages, dated 15 Oct 21 |
| VII | Government Response to Motion to Admit Evidence Under MRE 412, 8 pages, dated 22 Oct 21 |
| VIII | Special Victim's Counsel's Response to Motion to Admit Evidence Under MRE 412, 6 pages, dated 28 Oct 21 |
| XI | Defense Motion in Limine to Exclude Evidence under MRE 404(b), 10 pages, dated 15 Oct 21 |
| XII | Government Response to Defense Objection and Motion in Limine for Limitary Rule of Evidence 404(b) Evidence, 146 pages, dated 22 Oct 21 |
| XIII | Excerpts from ROI Page 24 – Messages Sent Between Unknown Number and Victim B.H., 8 pages, undated |
| XVI | Excerpts from ROI Page 12, 3 pages, undated |
| XXII | Excerpts from ROI Page 33, 2 pages, undated |

These materials were reviewed by trial and defense counsel and sealed by the military judge.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities,

undersigned counsel asserts that viewing the referenced exhibits is necessary to conduct a complete review of the record of trial and advocate competently on behalf of Appellant. Undersigned counsel's review of these materials is necessary to fully evaluate Appellant's case.

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

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

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

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

Respectfully Submitted,

[redacted]

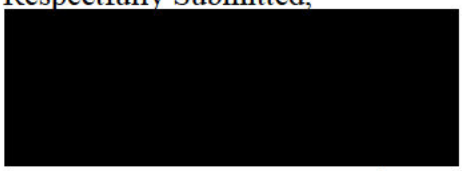
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 August 2022.

Respectfully Submitted,



MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

22 August 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS<br><br>No. ACM 40282<br><br>Panel No. 2 |

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Materials, dated 18 August 2022. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to the parties if the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States thus respectfully requests that any order issued by this Court also allows appellate counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 August 2022.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force
[redacted]

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40282** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Cody R. JENNINGS** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 2** |

On 18 August 2022, Appellant's counsel submitted a Motion to Examine Sealed Materials, requesting to examine Appellate Exhibits VI–XI, XII–XVI, and XXII. Appellant's motion states the exhibits "were reviewed by trial counsel and defense counsel and sealed by the military judge." Appellant's counsel avers "that viewing the referenced exhibits is necessary to conduct a complete review of the record of trial and advocate competently on behalf of Appellant."

The Government responded to the motion on 22 August 2022. It does not object to Appellant's counsel reviewing exhibits that were released to both parties at trial—as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials."

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

Accordingly, it is by the court on this 29th day of August, 2022,

**ORDERED:**

Appellant's Motion to Examine Sealed Materials, dated 27 July 2022, is **GRANTED**.

Appellate defense counsel and appellate government counsel may view Appellate Exhibits VI–XI, XII–XVI, and XXII, subject to the following conditions: To view the sealed materials, counsel will coordinate with the court.

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

FOR THE COURT

[redacted]

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

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

| | |
|---|---|
| **UNITED STATES**<br><br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>**CODY R. JENNINGS,**<br>USAF,<br><br>*Appellant*. | **) MOTION FOR ENLARGEMENT**<br>**) OF TIME (SECOND)**<br>)<br>) Before Panel No. 2<br>)<br>) ACM 40282<br>)<br>) Filed on: 9 September 2022<br>**)**<br>**)**<br>**)**<br>) |

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SSgt Cody R. Jennings hereby moves for the second enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 20, 2022. SSgt Jennings's brief is currently due on September 17, 2022. SSgt Jennings requests an enlargement for a period of 30 days, which will end on October 17, 2022. On the date requested, 150 days will have elapsed from the date of docketing. 112 days have elapsed from the date the record of trial was received to the present day. SSgt Jennings is currently confined.

On November 3, 2021, and February 2, 2022, SSgt Jennings was tried by a military judge sitting alone at a general court-martial at Joint Base San Antonio-Lackland, Texas In accordance with his pleas, SSgt Jennings was convicted of: one Charge and four specifications of broadcasting intimate visual images without consent in violation of Article 117A, Uniform Code of Military Justice (UCMJ); one Charge and four Specifications of extortion in violation of Article 127, UCMJ; and one Charge and one specification of assault, in violation of Article 128,

UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript has 367 pages. There are four prosecution exhibits, six defense exhibits, 29 appellate exhibits, and four court exhibits.

Through no fault of SSgt Jennings, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,

[redacted]
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on September 9, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

12 September 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40282<br><br>Panel No. 2 |

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

**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 12 September 2022.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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

| | |
|---|---|
| **UNITED STATES** | **) MOTION FOR ENLARGEMENT** |
| | **) OF TIME (THIRD) (OUT OF TIME) AND** |
| | **) MOTION TO WITHDRAW PREVIOUSLY** |
| | **) FILED THIRD ENLARGEMENT OF TIME** |
| *Appellee*, | ) |
| | ) Before Panel No. 2 |
| v. | ) |
| | ) ACM 40282 |
| | ) |
| Staff Sergeant (E-5) | ) Filed on: 12 October 2022 |
| **CODY R. JENNINGS,** | **)** |
| USAF, | **)** |
| | **)** |
| *Appellant*. | ) |

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SSgt Cody R. Jennings hereby moves for the third enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 20, 2022. SSgt Jennings also moves to withdraw his previously filed third Motion for Enlargement of Time, dated 9 October 2022 but erroneously filed on 7 October 2022.

Good cause exists to grant this motion and to do so out of time. Undersigned counsel filed the third Motion for Enlargement of Time in this case but did so too early, having attempted but failed to schedule the filing of the motion via Gmail for 9 October 2022—when the motion was dated. Counsel has been diligent in observing this Court's deadlines and only failed in her attempt to schedule the filing email for the correct day. Counsel was informed of her mistake by the Clerk's office at approximately 0845 EST on 11 October 2022 but was travelling that day and could not respond; this motion is submitted less than 20 hours later. To ensure effective representation in furtherance of Article 70, UCMJ, by Appellant's defense counsel, appellate

defense counsel requests that this Court grant the additional time needed for counsel to fully brief this case.

SSgt Jennings's brief is currently due on October 17, 2022. SSgt Jennings requests an enlargement for a period of 30 days, which will end on November 16, 2022. On the date requested, 180 days will have elapsed from the date of docketing. 145 days have elapsed from the date the record of trial was received to the present day. SSgt Jennings is currently confined.

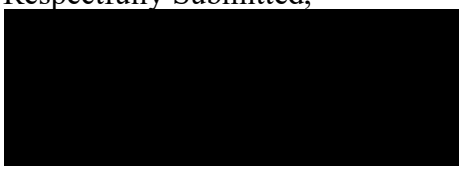
On November 3, 2021, and February 2, 2022, SSgt Jennings was tried by a military judge sitting alone at a general court-martial at Joint Base San Antonio-Lackland, Texas. In accordance with his pleas, SSgt Jennings was convicted of: one Charge and four specifications of broadcasting intimate visual images without consent in violation of Article 117A, Uniform Code of Military Justice (UCMJ); one Charge and four Specifications of extortion in violation of Article 127, UCMJ; and one Charge and one specification of assault, in violation of Article 128, UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript has 367 pages. There are four prosecution exhibits, six defense exhibits, 29 appellate exhibits, and four court exhibits.

Through no fault of SSgt Jennings, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,



MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on October 12, 2022.

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

13 October 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME – OUT OF TIME<br><br>ACM 40282<br><br>Panel No. 2 |

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 13 October 2022.

[redacted]

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

| | |
|---|---|
| **UNITED STATES**<br><br>*Appellee*,<br><br>v.<br><br>Staff Sergeant (E-5)<br>**CODY R. JENNINGS,**<br>USAF,<br><br>*Appellant*. | **) MOTION FOR ENLARGEMENT**<br>**) OF TIME (FOURTH)**<br>)<br>) Before Panel No. 2<br>)<br>) ACM 40282<br>)<br>) Filed on: 9 November 2022<br>**)**<br>**)**<br>**)**<br>) |

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SSgt Cody R. Jennings hereby moves for the fourth enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 20, 2022. SSgt Jennings's brief is currently due on November 16, 2022. SSgt Jennings requests an enlargement for a period of 30 days, which will end on December16, 2022. On the date requested, 210 days will have elapsed from the date of docketing. 173 days have elapsed from the date the record of trial was received to the present day. SSgt Jennings is currently confined.

On November 3, 2021, and February 2, 2022, SSgt Jennings was tried by a military judge sitting alone at a general court-martial at Joint Base San Antonio-Lackland, Texas In accordance with his pleas, SSgt Jennings was convicted of: one Charge and four specifications of broadcasting intimate visual images without consent in violation of Article 117A, Uniform Code of Military Justice (UCMJ); one Charge and four Specifications of extortion in violation of Article 127, UCMJ; and one Charge and one specification of assault, in violation of Article 128,

UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript has 367 pages. There are four prosecution exhibits, six defense exhibits, 29 appellate exhibits, and four court exhibits.

Of counsel's three cases currently before this Court, this case is third in priority. Counsel has one case in which the Court of Appeals for the Armed Forces recently granted review; that brief is due in 11 days and is currently taking up a significant amount of undersigned counsel's time. Counsel also has one case pending a grant of review before the Court of Appeals for the Armed Forces. In her civilian capacity, the undersigned is lead counsel in 14 cases before the United States Court of Appeals for Veterans Claims and the Federal Circuit.

Through no fault of SSgt Jennings, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on November 9, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

9 November 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40282<br><br>Panel No. 2 |

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

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

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

[redacted]

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

**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 9 November 2022.

[redacted]

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

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

| | |
|---|---|
| **UNITED STATES** | **) MOTION FOR ENLARGEMENT** |
| | **) OF TIME (FIFTH)** |
| *Appellee,* | ) |
| | ) Before Panel No. 2 |
| v. | ) |
| | ) ACM 40282 |
| | ) |
| Staff Sergeant (E-5) | ) Filed on: 9 December 2022 |
| **CODY R. JENNINGS,** | **)** |
| USAF, | **)** |
| | **)** |
| *Appellant*. | ) |

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SSgt Cody R. Jennings hereby moves for the fifth enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 20, 2022. SSgt Jennings's brief is currently due on December 16, 2022. SSgt Jennings requests an enlargement for a period of 30 days, which will end on January 15, 2023. On the date requested, 240 days will have elapsed from the date of docketing. 203 days have elapsed from the date the record of trial was received to the present day. SSgt Jennings is currently confined.

On November 3, 2021, and February 2, 2022, SSgt Jennings was tried by a military judge sitting alone at a general court-martial at Joint Base San Antonio-Lackland, Texas In accordance with his pleas, SSgt Jennings was convicted of: one Charge and four specifications of broadcasting intimate visual images without consent in violation of Article 117A, Uniform Code of Military Justice (UCMJ); one Charge and four Specifications of extortion in violation of Article 127, UCMJ; and one Charge and one specification of assault, in violation of Article 128,

UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript has 367 pages. There are four prosecution exhibits, six defense exhibits, 29 appellate exhibits, and four court exhibits.

Of counsel's three cases currently before this Court, this case is third in priority. Counsel has one case at the Court of Appeals for the Armed Forces pending the government's brief. Counsel also has one case pending a grant of review before the Court of Appeals for the Armed Forces. In her civilian capacity, the undersigned is lead counsel in 17 cases before the United States Court of Appeals for Veterans Claims and the Federal Circuit.

Through no fault of SSgt Jennings, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case. SSgt Jennings has been advised of his speedy trial rights and consents to the relief requested in this motion.

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

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on December 9, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

12 December 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40282<br><br>Panel No. 2 |

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

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

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

[redacted]

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 December 2022.

[redacted]

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40282** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Cody R. JENNINGS** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 2** |

On 9 December 2022, 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 14th day of December, 2022,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 January 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of his 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]

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

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

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| **UNITED STATES**<br><br>*Appellee*,<br><br>v.<br><br>Staff Sergeant (E-5)<br>**CODY R. JENNINGS,**<br>USAF,<br><br>*Appellant*. | **) MOTION FOR ENLARGEMENT**<br>**) OF TIME (SIXTH)**<br>)<br>) Before Panel No. 2<br>)<br>) ACM 40282<br>)<br>) Filed on: 8 January 2022<br>**)**<br>**)**<br>**)**<br>) |

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SSgt Cody R. Jennings hereby moves for the sixth enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 20, 2022. SSgt Jennings's brief is currently due on January 15, 2023. SSgt Jennings requests an enlargement for a period of 14 days, which will end on January 29, 2023. On the date requested, 254 days will have elapsed from the date of docketing. 233 days have elapsed from the date the record of trial was received to the present day. SSgt Jennings is currently confined.

On November 3, 2021, and February 2, 2022, SSgt Jennings was tried by a military judge sitting alone at a general court-martial at Joint Base San Antonio-Lackland, Texas In accordance with his pleas, SSgt Jennings was convicted of: one Charge and four specifications of broadcasting intimate visual images without consent in violation of Article 117A, Uniform Code of Military Justice (UCMJ); one Charge and four Specifications of extortion in violation of Article 127, UCMJ; and one Charge and one specification of assault, in violation of Article 128,

UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript has 367 pages. There are four prosecution exhibits, six defense exhibits, 29 appellate exhibits, and four court exhibits.

Of counsel's three cases currently before this Court, this case is third in priority. Counsel has one case at the Court of Appeals for the Armed Forces pending oral argument on January 25, 2023. Counsel also has one case pending a grant of review before the Court of Appeals for the Armed Forces. In her civilian capacity, the undersigned is lead counsel in 18 cases before the United States Court of Appeals for Veterans Claims and the Federal Circuit.

Through no fault of SSgt Jennings, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

Undersigned counsel has advised SSgt Jennings of his speedy trial rights and of her intention to submit this motion for enlargement of time. He agrees to the relief this motion requests.

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

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on January 8, 2023.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

9 January 2023

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

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| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40282<br><br>Panel No. 2 |

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

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

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

[redacted]

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

**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 9 January 2023.

[redacted]

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

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

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| **UNITED STATES**<br>*Appellee*, | ) | **ASSIGNMENT OF ERROR** |
| | ) | Before Panel No. 2 |
| v. | ) | |
| | ) | ACM 40282 |
| | ) | |
| Staff Sergeant (E-5)<br>**CODY R. JENNINGS,**<br>USAF,<br>*Appellant*. | ) | Filed on: 30 January 2023 |

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

**Issue Presented:**

**WHETHER SSGT JENNINGS'S SENTENCE IS INAPPROPRIATELY SEVERE.[1]**

*Statement of the Case*

On 8 November 2021 and 1-2 February 2022, SSgt Cody Jennings was tried by a military judge sitting alone at a general court-martial at Offutt Air Force Base, Nebraska. In accordance with his pleas,[2] SSgt Jennings was convicted of one charge and one specification of assault in

[1] SSgt Jennings notes that the original Convening Authority Decision on Action (CADA), dated 2 March 2022, had to be corrected for two reasons. The first is that the reprimand originally included in the CADA referenced an offense SSgt Jennings was not convicted of. The second was that the Convening Authority failed to take action on the sentence, an error because some of the convicted offenses occurred prior to 1 January 2019. (Record of Trial Volume 1, Convening Authority Decision on Action, 2 March 2022); *see United States v. Brubaker-Escobar,* 81 M.J. 471 (C.A.A.F. 2021). The legal office sent the military judge an email about the first issue; for the second, the military judge returned the CADA for new action on his own motion. (ROT Vol. 1, Emails between legal office and military judge dated 7-8 March 2022.) Rule for Courts-Martial (R.C.M.) 1104(b)(1)(F) allows a party to move to correct errors in the CADA. *See* R.C.M. 1104(b)(1)(F)(2019). It is not clear from the record that any party filed such a motion or that the military judge directed that one be filed. Nevertheless, because the Convening Authority did eventually correct both errors in the CADA, and because SSgt Jennings's case was timely docketed with this Court, SSgt Jennings agrees that this issue is moot.

[2] The Offer for Plea Argument SSgt Jennings signed provided that he would "waive all waivable motions" in exchange for certain guarantees as to the length of confinement. (Appellate Exhibit XXVII, para. 2.f.). But for the "waive all waivable motions" provision, SSgt Jennings would have moved for a finding of not guilty per R.C.M. 917 under Article 117a as to both

violation of Article 128, Uniform Code of Military Justice (UCMJ); one charge and four specifications of extortion in violation of Article 127, UCMJ; one charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ, and an additional charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the service with a dishonorable discharge, and to be reprimanded.

**THE SENTENCE IS INAPPROPRIATELY SEVERE.**

*Statement of Facts*

Almost all the offenses of which SSgt Jennings was convicted revolve around intimate images. He made demands for intimate pictures to people he knew, coupled with threats if they did not deliver the images he wanted. Prosecution Exhibit 1 (Pros. Ex. 1), pgs. 4-14. In several instances, he showed or transmitted intimate images to other people without the victims' consent. Prox. Ex. 1, pgs. 14-18. None of the offenses involved any physical contact or in-person activity save one – Charge III – for which he was convicted of kissing a friend at a bar. ROT, Vol. 1, Entry of Judgment; Pros. Ex. 1, pg. 2; R. 188-89.

SSgt Jennings has had a difficult few years. Before his arrest, SSgt Jennings suffered the devastating loss of his best friend by suicide. Defense Exhibit (Def. Ex.) F, pg 1. More recently,

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specifications of Charge V for failing to state an offense because the facts presented did not show that he "broadcasted" intimate visual images according to the plain language of the statute. *See* Art. 117a, UCMJ; *see United States v. Davis,* ARMY 20160069, 2018 CCA LEXIS 417, at *27 (A. Ct. Crim. App. 16 Aug. 2018) (finding that physically displaying an image on a phone to another present does not constitute a broadcast). In addition, SSgt Jennings would have sought reconsideration of the military judge's rulings as to the defense's Motion to Sever, Motion for a Unanimous Verdict, Motion to Introduce Evidence Under Military Rule of Evidence 412, and its Motion in Limine to Exclude Evidence Under Military Rule of Evidence 404(b). However, SSgt Jennings agrees that his guilty plea, combined with the waiver provision in the Offer for Plea Agreement, constitutes a waiver of these issues.

his father was diagnosed with incurable lymphoma, and just before trial, his brother died suddenly and unexpectedly. *Id.,* pgs. 1-2. Despite these challenges, SSgt Jennings's performance reports indicate that he continued to perform and volunteer at work. Pros. Ex. 4.

In addition, SSgt Jennings's convictions relate entirely to nonviolent offenses—the one contact offense he was convicted of involved kissing a friend outside of a bar.

At trial, the only derogatory evidence from SSgt Jennings's personnel records entered was a three-year-old Letter of Reprimand related to a failure to document technical data during engine maintenance. Pros. Ex. 3. The prosecution called no witnesses in its case in chief and none during rebuttal. In contrast, the defense presented evidence that SSgt Jennings took responsibility for the offenses (Def. Ex. F) and had given good and faithful service to the Air Force for the past ten years. Def. Exs. B-D. The Stipulation of Fact also acknowledged that SSgt Jennings gave information about his offenses to the prosecution in an effort to be helpful to the government. Pros. Ex. 1, ¶ 79; R. 175-76.

*Standard of Review*

Sentence appropriateness is reviewed *de novo*. *See United States v. Lane*, 64 MJ 1, 2 (C.A.A.F. 2006).

*Law*

Under Article 66(d), UCMJ (*2019 MCM*), this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (*2019 MCM*). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional

mandate to ensure a fair and just punishment for every accused."[3] *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted).

*Analysis*

A dishonorable discharge and 40 months confinement is inappropriately severe given SSgt Jennings's record and the facts and circumstances of the convicted offenses.

SSgt Jennings was convicted entirely of nonviolent offenses. He took responsibility for his actions, pleaded guilty, and provided a forthcoming *Care* inquiry. He also cooperated with the government's efforts to nail down the identity of at least one person involved in this case, providing information the government would otherwise not have had. R. 175-76.

While this Court may not grant clemency, it must nevertheless consider the entire record, including the nature of the crimes the accused was convicted of and all the mitigating evidence in deciding whether an adjudgment punishment is appropriate. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (*2019 MCM*). It should do so in this case, where the offenses are nonviolent, and the potential for rehabilitation is high.

[3] Prior versions of Article 66(c), UCMJ, have included the same or substantially similar language about sentence appropriateness, such that case law interpreting these provisions should be honored, even for cases referred after 1 January 2019. *See* Executive Order 13,825.

SSgt Jennings is not arguing that he deserves no punishment, just that a sentence of 40 months of confinement is inappropriately severe.

**WHEREFORE**, SSgt Jennings requests this Court exercise its authority under Article 66 to modify his sentence and reduce his term of confinement.

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

**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 January 30, 2023.

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

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

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|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | ANSWER TO ASSIGNMENT OF ERRORS |
| v. | ) | Before Panel No. 2 |
| Staff Sergeant (E-5)<br>**CODY R. JENNINGS**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40282<br><br>1 March 2023 |

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

## ISSUE PRESENTED

**WHEHTER APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE.**

## STATEMENT OF CASE

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

## STATEMENT OF FACTS

From 13 April to 8 May 2019 Appellant, acting through three fake personas, manufactured a scheme to harass, threaten and extort an Airman for his sexual gratification. (Pros. Ex. 1.) After Appellant extorted sexual images from the A , he continued to victimize her by broadcasting those images. Appellant also manipulated and exploited a more senior noncomissioned officer (NCO), a Sergeant , in his unit, solely to discredit and embarrass her. (Pros. Ex. 1.) Appellant admitted this behavior when he pled guilty to assault, extortion and wrongful broadcasting in this case. Appellant's guilty plea was accepted, and a plea agreement was executed. (*Entry of Judgment,* ROT Vol 2; App. Ex. XXVII.) During his plea inquiry, Appellant indicted he clearly understood that the plea created a

mandatory confinement period of 24 to 48 months and the possibility for a dishonorable discharge. (R. at 312.) Appellant told the military judge he understood that any sentence of confinement must run concurrently with other specifications under that charge, and that every charge would run consecutively to all other charges. (R. at 316.) Appellant was sentenced to a total confinement period of 40 months, reduction to E-1, total forfeiture and a dishonorable discharge. (*Entry of Judgment*, ROT, Vol. 2.)

First, Appellant pled guilty and was convicted in Charge III of one specification of Assault Consummated by Battery in violation of Art.128, UCMJ. (*Entry of Judgment*, ROT, Vol. 2.) Appellant assaulted B.H. by forcefully kissing her against her will. (Pros. Ex. 1 at 1-2; R. at 146, 156, 167, 187-189.) Appellant admitted at trial that the kiss was not consensual, and B.H. did not kiss him back. (R. at 190.) The terms of the plea agreement required a sentence of two to four months of confinement for this specification. (App. Ex. XXVII.) Appellant was sentenced to the minimum two months of confinement. (*Entry of Judgment,* ROT Vol. 2; App. Ex. XXVII.)

Next, Appellant was convicted in Charge IV of four specifications of extortion in violation of Art. 127, UCMJ. Appellant was sentenced to a separate term of confinement for each specification. (*Entry of Judgment,* ROT Vol. 2) Appellant used two spoof[1] phone numbers and a fake social media profile to hide his identity, threaten B.H., and demand sexual images of her. (Pros. Ex. 1 at 3-5; R. at 209-212, 346-350.) In Specification 1, Appellant used a fake Snapchat account to threaten BH. (Pros. Ex. 1; R. at 155, 364.) Appellant, using the fake account told B.H. he was a member of her unit and knew she worked as an exotic dancer

[1] A "spoofed" number is one created by a mobile phone application to hide a user's real phone number. Appellant used an application to send BH text messages from his phone, but on BH's device, it looked like a number from a user she did not know.

before joining the Air Force. Appellant, on the fake account, threatened to spread that information to their unit if she did not send him sexually explicit images. (Pros. Ex. 1 at 4-5; R. at 363-365.)

B.H. blocked the user and did not send any images. (Pros. Ex. 1 at 4-5.) Appellant then sent B.H. threatening text messages, from a spoof number. Again, Appellant told B.H. he was a member of their unit and would tell everyone A1C B.H. kissed Appellant if she did not send intimate images of herself. Appellant named B.H.'s boyfriend, another member of the unit, and threatened to sabotage the relationship if she did not send the sexual photos. (Pros. Ex. 1; R. at 156, 187.) B.H. eventually gave in to the demands and sent four sexually explicit images to Appellant's spoof number. For this specification, Appellant was sentenced to 20 months of confinement, the sentence runs concurrent with all other specifications in Charge IV.

In Specification 2 of Charge IV, Appellant continued his demands and threats. (Pros. Ex. 1 at 5-8; R. at 156, 187.) While B.H. was at work, Appellant, using a spoof number demanded sexually explicit images of her. Below is a text message exchange illustrative of the messages Appellant would send B.H. while she was at work. (Pros. Ex. 1 at 8.)

Accused (spoof number): Then help me cum

BH: I'm at work right now.

Accused (spoof number): Go to the bathroom send a tit pic

BH: I can't do that. I need to get ready to get on the truck after roll call

Accused (spoof number): Isn[t] roll call at 11?

BH: It's Sunday. We come in late.

Accused (spoof number): You have 6 minutes till roll call. Take one

BH: I can't another chick on shift could come in the bathroom.

Accused (spoof number): Ok. I'll just tell him [C , B.H.'s boyfriend] then

BH: Please don't I just can't take any pictures right now. Its not doable. I'm literally terrified of you and what you could tell C . Just please don't.

Appellant was sentenced to 20 months of confinement for this phase of the extortion scheme.

In Specification 3 of Charge IV, Appellant, using a spoof number, threatened to sabotage BH's relationship with her boyfriend if she did not send intimate visual images of another female crew chief in their unit. (Pros. Ex. 1; R. at 160, 365-368.) Appellant told OSI that he made these demands to try and ruin the friendship between the two women. (Pros. Ex. 1 at 11.) For this act of extortion, Appellant was sentenced to 25 months of confinement. (*Entry of Judgment,* ROT Vol. 2.)

In Specification 4 of Charge IV, Appellant pled guilty to seeking sexual favors form B.H. through extortion. Appellant had two text conversations with B.H. In the first conversation, Appellant used a spoof number and told B.H. the threats would end if she performed fellatio on him and submitted to anal and vaginal penetration. (Pros. Ex. 1 at 11-14; R. at 163-165, 366.) In the second conversation, Appellant did not conceal his identity. He offered B.H. advice on dealing with the extortion threats. Appellant, without concealing his identity, told B.H. giving into the sexual demands of the extorters would be the best course of action. (Pros. Ex. 1 at 11-15; R. at 367.) Appellant knew B.H. would confide in him about the extortion threats and planned on manipulating her when she did. Appellant was, at that point, someone BH considered a friend and senior leader. (Pros. Ex. 1 at 11-15.) Appellant essentially played two sides in the scheme. He used a spoof number to threaten and extort B.H., then used his real number and identity to convince B.H. to give in to the extortion demands. Appellant was sentenced to 30 months of confinement for this specification. Because all the terms of confinement in Charge IV are concurrent to each other, Appellant was sentenced to a total of 30 months for all the extortion conduct. (*Entry of Judgment,* ROT Vol. 2.)

Appellant pled guilty to two violations of Art. 117a in Charge V. Appellant was sentenced to four months for each specification, to be served concurrently. (*Entry of Judgment,* ROT Vol. 2.) Appellant broadcasted images of C.M., a female NCO in his unit. C.M. and her husband, another member of the same unit, both shared personal details of their marriage with Appellant. (R. at 354.) C.M. started a romantic relationship with Appellant and sent him intimate visual images. (Pros. Ex. 1 at 15-16; R. at 354.) In Specification 1, Appellant showed airmen in the unit two of intimate images of C.M., to brag about their relationship. (Pros. Ex. 1 at 15; R. at 248, 260.) In Specification 2, Appellant shared another intimate image of C.M. with B.H. and her boyfriend. (Pros. Ex. 1 at 16; R. at 260.) Appellant did not have permission to share any of C.M.'s intimate images with others. (Pros. Ex.1 at 14-15, 17; R. at 246, 259-260, 266.) Appellant admitted that broadcasting the images hurt C.M. and make it impossible for two shops, engines and electronics, to accomplish missions together. (R. at 248-250, 259-262 265.)

Finally, Appellant pled guilty to two specifications of Art. 117a in Additional Charge for broadcasting intimate images of BH. Appellant was sentenced to four months for each specification, to be served concurrently. (*Entry of Judgment,* ROT Vol. 2.) Appellant broadcasted an extorted image of B.H. to another technical sergeant in BH's unit. Appellant knew that sharing this image of B.H. would embarrass her and cause her to lose respect at work. (Pros. Ex. 1 at 16-18; R. at 158.) Appellant broadcasted one extorted image of B.H. via text message to C.M. (Pros. Ex. 1 at 17, R. at 283-285.) Appellant used the image to try and convince C.M. that B.H. was not credible and to create distrust between the two women at work. (R. at 286, 368-369.)

The Government withdrew Charge I and Charge II with prejudice after Appellant's guilty plea. (App. Ex. XXVII.; *Entry of Judgment,* ROT Vol. 2.) Finally, Appellant understood that a benefit of his plea agreement was a reduced confinement period of 24 to 48 months. (R. at 313, 316.) In contrast, without a plea agreement, Appellant understood he was facing a maximum confinement period of up to 20 years and six months. (R. at 298.)

## ARGUMENT

### *Standard of Review*

This Court reviews sentence appropriateness *de novo*. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)(en banc.)(per curiam.)(citation omitted.). The interpretation of a pretrial agreement is a question of law and is also reviewed *de novo.* United States v. Acevedo, 50 M.J. 169, 172 (C.A.A.F. 1999).

### *Law*

Pursuant to Article 66(d), UCMJ, this Court may affirm a "sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(2019). This Court is tasked with determining sentence appropriateness to ensure an appellant gets the punishment that his actions merit. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988); *see also* United States v. Baker, 28 M.J. 121, 122 (C.M.A.1989). In evaluating sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Bailey, ACM 37746, 2013 CCA LEXIS 241 at *4 (A.F. Ct. Crim. App. 19 Mar. 2013.)(unpub. op.), *rev. denied*, 2013 CAAF LEXIS 697 (C.A.A.F. 28 June 2013)(citations omitted). This Court does not have the power to engage

in exercises of clemency. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015.)(en banc.)(citing United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010).

***Analysis***

Appellant's sentence should be affirmed as entered on the Entry of Judgment, because Appellant received the punishment he deserves. Appellant, to gratify his sexual desires, assaulted an A and effectively ended her Air Force career. He exploited a marriage, sabotaged trust among members of his unit and tarnished the reputation of a female NCO. Appellant does not present any compelling arguments in support of a shorter confinement period. Appellant argues his crimes are "non-violent" and a 40-month confinement period is too long. (App. Br. 5.) Appellant forcefully assaulted an A , then used that assault as leverage to harass her at work for weeks. Appellant flaunted sexually explicit images of a more senior NCO to discredit her at work. Appellant's behavior not only terrified and harmed his victims, but the actions also put the entire military mission at risk. Both of his victims, their romantic partners and the people Appellant broadcasted the images to, were all part of the same unit. Appellant's action made it impossible for two shops within the unit, engines and electronics, to work on the same planes and forced members to shuffle their schedules to avoid each other. (R. at 251) The confinement period is appropriate for Appellant's conduct of initiating elaborate schemes to gratify his sexual desires at the price of unit trust and cohesiveness. The record of trial, Appellant's service record, and personal characteristics, support affirming the sentence as adjudged.

Appellant characterizes the assault in Charge III as "non-violent" and "kissing a friend at a bar." (App. Br. at 2, 4.) An unwanted physical attack is a violent act, not a "kiss". Appellant saw that B.H. was upset over an argument with her boyfriend, and Appellant exploited the

situation. (Pros. Ex. 1 at 1-3; R. at 364.) Appellant followed B.H. to an alleyway and forced a kiss on her while she was crying. Appellant knew he did not have consent, because B.H. did not kiss him back. (R. at 187-189, 364.) B.H. after this assault, and the harassment that followed, struggled at her job. B.H. had to constantly change her shift to avoid running into Appellant. Other servicemembers were distant with her and it was difficult for others to work with her, where previously she was well liked. (Court. Ex. B) Appellant was sentenced to 60 days of confinement for this behavior, the minimum permitted by the plea agreement – a minimum Appellant proposed for the plea agreement. (R. at 373.) Sixty days of confinement for a SSgt forcing a kiss on an A , then using that assault to harass and extort the A , is an appropriate sentence and should be affirmed.

Appellant used the assault for leverage in his next crime, extortion. (R. at 189.) Appellant told the military judge he concealed his identity so that his threats and messages to B.H. "[W]ouldn't mess up my day-to-day life". (R. at 212.) Appellant had no regard for "messing-up" BH's day-to-day life. When B.H. was at work, Appellant would send messages demanding intimate images of BH. Appellant would be specific in his requests, asking for images of a breast, or buttocks in underwear. (Pros. Ex. 1 at 6-14.) Appellant would pressure B.H. to take the pictures or else he would sabotage her relationship. (Pros. Ex.1 at 6; R. at 209-212, 346-350.) Appellant even threatened B.H. to find and send him sexually explicit photos of another crew chief. (Pros. Ex. 1 at 9-11.) Appellant hoped this request would create a rift between the crew chiefs. Appellant was willing to harm the mission to gratify his sexual desires. (Pros. Ex. At 11.) B.H. caved to the Appellant's demands and sent four of intimate visual images of herself for Appellant's sexual gratification. (Pros. Ex. 1, R. at 213-214.) Appellant

was not satisfied, he wanted more and continued to threaten and harass BH. (Pros. Ex. 1 at; R. at 159, 213.)

Appellant's conduct had a significant negative impact on B.H. She told the military judge, "I never got the chance in my almost 5 years in the Air Force to be anything but the walking SARC case." (Court Ex. B; R. at 349.) BC applied for early separation, and her entire career was derailed by Appellant's behavior. (Court Ex. B; R. at 350.) A 30-month confinement sentence for this conduct is appropriate. (App. Ex. XXVII.) The confinement period is well within the facts and the law, and it should be affirmed.

Appellant's victimization of B.H. did not end with extortion. (Pros. Ex. 1 at 16-18.) Despite B.H. giving in to Appellant's demands, Appellant still broadcasted the extorted images to members in their unit and created distress for B.H. at work. (Pros. Ex. 1 at 16-18; R. at 349.) This behavior directly undermined B.H.'s ability to do her job and serve the mission. B.H. was in fear about who could have seen her images, she was fearful of all her male team members. (Court. Ex. B) Appellant seeks mitigation credit for helping OSI identify one of the airmen involved in the broadcasting charges. (App. Br. at 4.) But Appellant involved that Airman in the broadcasting by sharing BH's extorted images with him. Appellant does not deserve credit for helping OSI solve a problem he created. Broadcasting the extorted images was the pinnacle of Appellant's scheme. Members who jeopardize the mission by harassing members of their unit at work, need to be held accountable. Four months of actual confinement, for this final step in Appellant's lengthy extortion scheme is how Appellant will be held accountable.

Appellant also tried to discredit C.M., a higher-ranking NCO and embarrass her at work, effecting her reputation and the mission. (Pros. Ex.1; R. at 250, 354-359, 368.) C.M.'s

husband worked with Appellant every day before Appellant victimized C.M. After the broadcasting of the images, Appellant, C.M. and C.M.'s husband could not work together. Appellant told the military judge that parts of the mission were not accomplished effectively because of the wedge Appellant created between himself and the other NCOs. (Pros. Ex. 1 at 251) Appellant took those risks, at the expense of the mission, for his own sexual gratification. Four months of confinement for Appellant's intentional conduct to embarrass a more senior NCO and create tension in the unit was within the law, the facts and the plea agreement, it should be affirmed by this Court.

Appellant's service record is not a mitigating factor, as Appellant argues. (App. Br. 4.) Appellant's service is how he gained access to his victims. Appellant abused his position as part of a closely knit unit to collect information on his victims and commit these crimes. Both victims said they and their romantic partners trusted and confided in Appellant. (R. at 348, 354.) B.H. testified that Appellant had mentored her, was one of her boyfriend's closest friends, and deployed with them. (R. at 347.) C.M.'s marriage was strained due to her husband's deployment; Appellant knew and exploited that fact. (Pros. Ex. 1 at 14-15.) Appellant then broadcasted intimate photos of C.M. to other members of the unit to embarrass her. (Pros. Ex. 1 at 14-15; R. at 250, 354-359, 368.) Appellant harassed and extorted his fellow servicemembers and played both sides of the scheme to satisfy his sexual desires. Appellant's callous actions had a decidedly negative effect on his unit, and therefore merited significant punishment.

Finally, Appellant argues that his personal characteristics support a reduced confinement period. Mainly, that he lost loved ones, has a young son and accepted responsibility by pleading guilty. (App. Br. 4.) The military judge already considered this information when it was presented

at trial. Appellant proffered about the death of his friend in 2016, the loss of his father in 2018, and the loss of his brother in 2022. (R. at 359-360.) Appellant also presented evidence of his relationship with his son. (Defense Exhibit D.) Appellant is correct in stating he gave a forthcoming plea inquiry and accepted responsibility. (App. Br. 4.) Appellant benefited from his acceptance of responsibility when Charges I and II were dismissed upon execution of the plea agreement. (*Entry of Judgment,* ROT Vol. 2.) Appellant originally faced a maximum exposure of confinement of more than 20 years. (R. at 298.) Because of his willingness to plead guilty, Appellant is now serving a sentence of less than four years. Appellant does not offer any new facts or arguments to support this request for a further reduced confinement period.

The military judge properly considered the facts of each specification in this case. The sentence accurately reflects Appellant's lengthy and dangerous scheme of manipulating and exploiting his fellow service members. Appellant sabotaged marriages, friendships and the mission, for the sole purpose of gratifying his sexual desires. Even if the majority of Appellant's conduct was "nonviolent," the severe emotional harm and harm to the mission that it caused still warrant significant punishment The confinement sentence properly addresses this conduct, the Appellant's service record and personal characteristics. The sentence of 40-months of confinement, reduction to E-1, total forfeiture and dishonorable discharge should be affirmed.

## CONCLUSION

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

[redacted]
DEYANA F. UNIS, 1st Lt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 March 2023.

DEYANA F. UNIS, 1st Lt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40282** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF PANEL CHANGE** |
| **Cody R. JENNINGS** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | |

It is by the court on this 8th day of August, 2023,

**ORDERED:**

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40282** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Cody R. JENNINGS** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 3** |

This court specifies the following issue for briefing in the above-captioned case:

> WHETHER APPELLANT'S PLEAS TO TWO SPECIFICATIONS OF WRONGFUL BROADCASTING OF INTIMATE VISUAL IMAGES (CHARGE V AND ITS SPECIFICATIONS) WERE PROVIDENT WHEN THE CONDUCT ADMITTED BY APPELLANT CONSISTED OF DISPLAYING IMAGES ON HIS CELLULAR PHONE FOR OTHERS TO VIEW.*

Accordingly, it is by the court on this 8th day of September, 2023,

**ORDERED:**

Appellant and Appellee shall file briefs on the specified issues with this court. Both briefs are due not later than **25 September 2023**. No reply briefs will be permitted without leave from the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

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* *See* Article 117a(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 917a(b)(1) ("The term 'broadcast' means to electronically transmit a visual image . . . ."); *United States v. Lajoie*, 79 M.J. 723, 727 (N.M. Ct. Crim. App. 2019); *United States v. Davis*, ARMY 20160069, 2018 CCA LEXIS 417, at *27 (A. Ct. Crim. App. 16 Aug. 2018) (unpub. op.), *aff'd on other grounds*, 79 M.J. 329 (C.A.A.F. 2020).

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

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee*, | ) | **ANSWER TO SPECIFIED ISSUE** |
| | ) | Before Panel No. 3 |
| v. | ) | |
| | ) | ACM 40282 |
| | ) | |
| Staff Sergeant (E-5)<br>**CODY R. JENNINGS,**<br>USAF,<br>*Appellant*. | ) | Filed on: 25 September 2023 |

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

**SPECIFIED ISSUE**

**WHETHER APPELLANT'S PLEAS TO TWO SPECIFICATIONS OF WRONGFUL BROADCASTING OF INTIMATE VISUAL IMAGES (CHARGE V AND ITS SPECIFICATIONS) WERE PROVIDENT WHEN THE CONDUCT ADMITTED BY APPELLANT CONSISTED OF DISPLAYING IMAGES ON HIS CELLULAR PHONE FOR OTHERS TO VIEW.**

**STATEMENT OF THE CASE**

On 8 November 2021 and 1-2 February 2022, SSgt Cody Jennings was tried by a military judge sitting alone at a general court-martial at Offutt Air Force Base, Nebraska. In accordance with his pleas, SSgt Jennings was convicted of one charge and one specification of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ); one charge and four specifications of extortion in violation of Article 127, UCMJ; one charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ, and an additional charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ. He was sentenced to reduction to the grade of E-1, confinement for 40 months, to be discharged from the service with a dishonorable discharge and a reprimand.

On 8 September 2023, this Court specified the issue above.

## STATEMENT OF THE FACTS

SSgt Jennings pleaded guilty to and was convicted of, among other offenses, two specifications of wrongful broadcasting of intimate visual images in violation of Article 117a, UCMJ (Charge V and its specifications). R at 116. The facts underpinning that charge were that SSgt Jennings possessed intimate images of C.M., whom he had previously dated, on his phone. R. at 145. C.M. had voluntarily sent SSgt Jennings the intimate images for his personal viewing. R. at 143-144. While deployed to Al Udeid Air Base in 2018, SSgt Jennings showed several other people those intimate images from his phone. R at 145. He did so by pulling up the images on his phone and physically showing the phone's screen to one or more people around him. *Id.* At least one of the people he showed the images to recognized C.M., who SSgt Jennings also named as the person in the images. R. at 216. SSgt Jennings did not send the intimate images of C.M. to anyone electronically or otherwise publicly display the images.

SSgt Jennings was sentenced to four months of confinement for each specification of Charge, V, to run concurrently with each other. R. at 362-63.

## Standard of Review

This Court reviews questions of law arising from a guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

**Article 117a and Relevant Background**

Article 117a of the UCMJ creates criminal liability for a servicemember "who knowingly and wrongfully broadcasts or distributes" certain intimate or sexually explicit images. 10 U.S.C. § 917a (2017).

The statute defines "broadcast" as to "electronically transmit a visual image with the intent that it be viewed by a person or persons." *Id.* It does not define what "electronically transmit" means. It defines "distributes" as delivery "to the actual or constructive possession of another person, including transmission by mail or electronic means." *Id.*

Two of this Court's sister service courts have considered whether the conduct SSgt Jennings pleaded guilty to in Charge V—displaying intimate images on his cellphone for others to see—satisfied the definition of both a broadcast and an electronic transmission. Both service courts relied on a textual analysis of Article 117a but came to opposite conclusions.

In *United States v. Davis,* ARMY 20166069, 2018 CCA LEXIS 417 (A. Ct. Crim. App. 16 Aug. 2018) (unpub. op.), *judgment aff'd*, 79 M.J. 329 (C.A.A.F. 2020), the Army Court of Criminal Appeals (CCA) found that a soldier who had used his cell phone to show another servicemember a recording of a third person's buttocks—made without the victim's knowledge or consent—had not broadcasted the image. The Army CCA decided that Davis had not electronically transmitted the images because Congress limited the definition of "broadcast" to an electronic transference only. *Davis*, 2018 CCA LEXIS 417 at *24-25. The Army CCA also noted that in 2004 Congress had enacted a similar statute to Article 117a, the Video Voyeurism Prevention Act of 2004 (VVPA). *Id.*at 26. The Army CCA noted that part of the impetus for the VVPA was the compounded violation of privacy when intimate images "find their way to the internet." *Id.*

The Army CCA decided that showing another soldier an image on a cell phone without sending or otherwise transmitting the image to anyone else did not fit the behavior the statute aimed to prohibit, and accordingly found Davis's plea improvident. *Id.*

The next year, the Navy CCA considered the same situation and came to the opposite conclusion. In *United States v. LaJoie,* 79 M.J. 723 (N-M. Ct. Crim. App. 2019), the Navy CCA found that a servicemember who used his cellphone screen to display intimate images of a former romantic partner to three other people on separate occasions had broadcast the images per the definition in Article 117a. The Navy CCA opined that the Army CCA's definition of broadcasting in *Davis* was "too narrow." *LaJoie,* 79 M.J. at 727. The Navy CCA reasoned that Davis had effectuated an electronic transmission by using an electronic device—his cellphone—to transmit an image to others, and that rendering delivery of the image through another device was unnecessary. *Id.*

The Navy CCA further concluded that "distribution" and "broadcasting" were two different acts under the statute, with the prohibition against broadcasting aimed at the display of images. In contrast, the prohibition against distribution was aimed at delivering the images into the possession of another. *Id*. at 727-28.

The Navy CCA also found that the "electronic transmission" required by the offense could have been satisfied by the electronic transmission of an image between a cellphone's camera sensor and its digital storage card or between the digital storage card and the display screen. *Id*. at 727.

Senior Judge Hitesman dissented as to the Navy CCA's definition of "broadcast," opining that the word should mean "an electronic transmission be sent out and received 'beyond the place from which [it is] sent,'" citing the definition found in a copyright infringement statute. *Id.* at 728 (Hitesman, S.J., dissenting) (citing 17 U.S.C. § 101).

## ARGUMENT

**SSgt Jenning's guilty plea to Charge V and its specifications was improvident because the underlying conduct did not meet the statutory definition of a "broadcast" of intimate images.**

This Court should adopt the *Davis* court's reasoning: the display of an image on a cellphone is not a "broadcast" within the definition of Article 117a, UCMJ, because it does not constitute an electronic transmission. The Court should reject *LaJoie's* conclusion that such an action can constitute a broadcast.

*Plain Language*

As both CCAs observed, any analysis of a statute should begin with its plain language. "Statutory construction begins with a look at the plain language of a rule." *United States v. Lewis*, 65 M.J. 85 (C.A.A.F. 2007) (citing *United States v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 241-42, (1989)). The plain language of a statute will control unless it is ambiguous or leads to an absurd result. *Id.* at 88.

Article 117a defines a broadcast, in part, as an "electronic transmission" but does not further define transmission. 10 U.S.C. § 917a(b)(1). While the *LaJoie* court found that any electronic exchange of data—including data exchanged between a cellphone's components—could constitute an electronic transmission, the Army CCA in *Davis* decided that an electronic transmission had to include that some information be sent to *someone else* to satisfy the statute—and that merely displaying the image was not enough to constitute a transmission.

The Army Court is correct. First, although Article 117a of the UCMJ does not explicitly say what an electronic transmission is, at least one other statute does. 19 U.S.C. § 1401(n) defines an "electronic transmission" as the "transfer of data or information through an authorized electronic data interchange system consisting of, but not limited to, computer modems and computer

networks." This definition accords both with the Army CCA's logic and with common sense: in the normal way of speaking, an electronic transmission is the sending of data from one electronic device to another—not the automated transfer of data between the components within a single cell phone and not the mere display of a digital screen to the eyes of another viewer.

For instance, a television or radio broadcast is the transmission of an electronic signal from one electronic source—generally a transmitter within a television or radio studio—and its *reception* by another electronic device, either a television or a radio. In more recent times, the broadcast and reception might occur between two internet-equipped electronic devices, such as cellphones or laptops. But in the cases at issue, while there may have been a first electronic device involved—a cellphone—no second electronic device received the signal, and thus there was no broadcast or electronic transmission.

*Surplusage and Absurd Results*

This reading of the statute also accords with the surplusage canon, which holds that, if possible, every word and provision of a statute should be given effect, and no word should be given an interpretation that causes it to duplicate another provision or otherwise become meaningless. *See United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017). The Army CCA's take on the difference between broadcast and distribution is consistent with the surplusage canon, noting

> Congress intentionally included two modes of transference for a distribution and only delineated one mode of transference for a broadcast. Based on our analysis of "broadcast" within the context of the statute, we conclude there is no basis for finding that Congress intended the definition of "broadcast" to include the mere physical act of displaying a video to one other physically present soldier.

*Davis*, 2018 CCA LEXIS 417 at *25.

Further, statutory construction must strive to avoid absurd results. *See United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012). By contrast, the Navy CCA's read leads to an absurd result:

the finding that an image displayed on a cellular phone but not sent anywhere else constitutes an electronic transmission.

First, the Navy CCA's suggestion in *LaJoie* that an automated exchange of an image between a cellphone's components could constitute a transmission promotes absurdity. *See Lajoie*, 79 M.J. at 727. Article 117a is aimed at prohibiting behavior that harms individuals who have had their intimate images shared without their permission, which is why an essential component of the statute is that the images be shared or disseminated such that third parties—not the victim or the disseminator of the images—views them. *See* 10 U.S.C. § 917a(a)(3)-(4). The prohibited conduct logically cannot include the mere taking of a photograph and that image's electronic transmission within individual cellphone components. Such an interpretation de-couples the statute's intent—to prohibit the dissemination of intimate images without permission—from the prohibited conduct of broadcast or distribution. Put another way, by the Navy CCA's logic, if SSgt Jennings had digitally transmitted an intimate image of C.M. to a printer and then showed the printed image to a third party, he would be guilty of an offense under Article 117a, UCMJ. Even more absurd, by the same token, he might still be guilty of the offense if he received the image on his cell phone, which automatically transferred the image to cloud database storage, faithfully reproduced the image via pencil sketch to within photographic quality, and then showed the drawing to a third party.

But merely showing a third party intimate images of an unwilling third party is not the harm Congress intended to remedy when it instituted Article 117a. The article's adoption directly responded to the "Marines United" scandal. "Marines United" was a Facebook group of over 30,000 members in which nude images of female service members were frequently shared without

permission.[1] Rep. Frankel described the new statute as responding to "the offensive Marines United Facebook page and others like it. On these pages, male [M]arines posted nude or intimate photos of female servicemembers and veterans without their consent." 163 Cong. Rec. H3052 (daily ed. May 2, 2017) (statement of Rep. Frankel).

Congress aimed this statute at the potential harm caused by intimate images being distributed or otherwise shown on the internet, not people physically showing such images to others. Rep. Lee also commented in the same session, "No woman should have her private photos exposed on the *internet* (emphasis added), especially not by her fellow servicemembers." 163 Cong. Rec. H3052 (daily ed. May 2, 2017) (statement of Rep. Lee). And as the Army CCA recognized in *Davis* when it cited the VVPA, this is not the first time that Congress has considered the unique harms that occur when victims' intimate images are available on the internet:

> In the House Report for 18 U.S.C. section 1801, Congress stated the background and need for this legislation was the "development of small, concealed cameras and cell phones, along with the instantaneous distribution capabilities of the Internet, have combined to create a threat to the privacy [...]." H.R. Rep. No, 108-504, at 3 (2004). Congress expressed a concern for a compounded violation of privacy when an image of an individual's private area is captured without their consent and then "[...] pictures or photographs find their way to the internet." *Id.*
>
> *United States v. Davis*, 2018 CCA LEXIS 417 at *24-25.

Accordingly, displaying an image on a cellphone to another person without receipt by the second person is not the behavior that Congress intended to prohibit when it enacted Article 117a.

[1] https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/

## CONCLUSION

This Court should adopt *Davis*'s logic and reject *Lajoie*'s overbroad interpretation of what constitutes an electronic transmission. The plain language of Article 117a and the ordinary meanings of the words "broadcast" and "electronic transmission" show that the statute does not contemplate the conduct SSgt Jennings pleaded guilty to. Moreover, the Congressional record shows that the legislation intended to prohibit the unique harms that come from intimate images' distribution and broadcast on the internet—not an individual cellphone held up for a third party to see.

Accordingly, the Court should find SSgt Jennings's plea to Charge V and its specifications improvident.

WHEREFORE, this Court should dismiss Charge V and its specifications with prejudice and order his sentence to confinement reduced by four months.

Respectfully Submitted,

[redacted]
MEGAN HOFFMAN, Maj, USAF
Appellate Defense Division
[redacted]

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 September 2023.

[redacted]

MEGAN E. HOFFMAN, Maj, USAF
Appellate Defense Division
[redacted]

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

| | | |
|---|---|---|
| **UNITED STATES**, *Appellee,* | ) | ANSWER TO COURT SPECIFIED ISSUE |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5) **CODY R. JENNINGS** United States Air Force *Appellant.* | ) | No. ACM 40282 |
| | ) | 25 September 2023 |

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

## ISSUE PRESENTED

**WHETHER APPELLANT'S PLEAS TO TWO SPECIFICATIONS OF WRONGFUL BROADCASTING OF INTIMATE VISUAL IMAGES (CHARGE V AND ITS SPECIFICATIONS) WERE PROVIDENT WHEN THE CONDUCT ADMITTED BY APPELLANT CONSISTED OF DISPLAYING IMAGES ON HIS CELLULAR PHONE FOR OTHERS TO VIEW.**

## STATEMENT OF CASE

Appellant's general court-martial was held on 8 November 2021 and 1-2 February 2022 at Offutt Air Force Base, Nebraska. He was tried by a military judge sitting alone. In accordance with his pleas, Appellant was convicted of one charge and one specification of assault in violation of Article 128, UCMJ; one charge and four specifications of extortion in violation of Article 127, UCMJ; one charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ, and an additional charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ. He was sentenced to be reduced to the grade of E-1, to be confined for 40 months, to be discharged from the service with a dishonorable discharge, and to be reprimanded.

Appellant filed his one assignment of error on 30 January 2023, and the United States filed its answer on 1 March 2023. On 8 September 2023, this Court specified the above issue applicable to the one charge and two specifications of wrongful broadcasting in violation of Article 117a, UCMJ.

## STATEMENT OF FACTS

Appellant and CM were assigned to the same unit at Offutt Air Force Base, Nebraska. (Pros. Ex. 1 at 1, 15). CM's husband was also a member of Appellant's unit. (Pros Ex. 1 at 15). CM started a romantic relationship with Appellant and sent him intimate visual images. (Pros. Ex. 1 at 15-16). Twice Appellant broadcasted images of CM by showing the screen of his cell phone to other Airmen in the unit once while deployed to Al Udeid, Qatar and once while in Omaha, Nebraska. (Pros. Ex. 1 at 15-16). Appellant pleaded guilty to two specifications of broadcasting intimate images of CM in violation of Article 117a, UMCJ (Charge V, Specifications 1 and 2).

### *Charge V, Specification 1*

Charge V, Specification 1 read:

> Did, at or near Al Udeid Air Base, Qatar, between on or about 1 August 2018 and on or about 31 December 2018, knowingly, wrongfully, and without the explicit consent of [ CM], broadcast intimate visual images of [ CM], who was at least 18 years of age when the visual image were created and is identifiable from the visual images or from information displayed in connection with the visual images, when he knew or reasonably should have known that the visual images were made under circumstances in which [ CM] retained a reasonable expectation of privacy regarding any broadcast of the visual images, and when he knew or reasonably should have known that the broadcast of the visual images was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for [ CM], or to harm substantially [ CM] with respect to her health, safety, business, calling, career, financial condition, reputation, or personal relationships, which conduct, under the circumstances, had a

> reasonably direct and palpable connection to a military mission or military environment.

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

CM sent Appellant intimate images of herself. (Pros. Ex. 1 at 15). Then while he was deployed to Qatar, Appellant showed the intimate images of CM to three Airmen in his deployed unit, at least one of whom recognized CM. (Pros. Ex. 1 at 15; R. at 248, 260). Appellant did not have permission to share any of CM's intimate images with others. (Pros. Ex.1 at 14-15, 17; R. at 246, 259-260, 266).

***Charge V, Specification 2***

Charge V, Specification 2 read:

> Did, at or near Omaha, Nebraska, between on or about 13 April 2019 and on or about 14 April 2019, knowingly, wrongfully, and without the explicit consent of [ CM], broadcast intimate visual images of [ CM], who was at least 18 years of age when the visual images were created and is identifiable from the visual images or from information displayed in connection with the visual images, when he knew or reasonably should have known that the visual images were made under circumstances in which [ CM] retained a reasonable expectation of privacy regarding any broadcast of the visual images, and when he knew or reasonably should have known that the broadcast of the visual images was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for [ CM], or to harm substantially [ CM] with respect to her health, safety, business, calling, career, financial condition, reputation, or personal relationships, which conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

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

In Specification 2, Appellant shared another intimate image of CM with BH and her boyfriend. (Pros. Ex. 1 at 16; R. at 260.) Appellant did not have permission to share any of CM's intimate images with others. (Pros. Ex.1 at 14- 15, 17; R. at 246, 259-260, 266.)

Appellant admitted that broadcasting the images hurt CM and made it impossible for two shops, engines, and electronics, to accomplish missions together. (R. at 248-250, 259-262 265.)

***Military Judge's Definitions***

The military judge identified the issue raised by this Court before the Care inquiry with Appellant began. In summarizing previous R.C.M. 802 conferences, the military judge stated:

> Regarding the definition of broadcasts as alleged in the Article 117a specifications and the Additional Charge as well as Charge V, the court oriented the parties and the defense specifically to United States v. Lajoie . . . as well as United States v. Davis which is cited inside that decision . . . I asked the defense to review that in preparation for the session.

(R. at 131-132). The military judge also asked trial defense counsel to review Executive Order 14062 and United States v. Hiser, 82 M.J. 60 (C.A.A.F. 2022). (R. at 132). The military judge said:

> So I wanted to make sure that the defense had as much time as they needed and as much time as they needed with their client to be able to state with confidence their willingness to proceed forward and their confidence in their ability to have rendered appropriate advice to their client on this matter.

(R. at 132). Trial defense counsel confirmed they had enough time to review the cases and discuss with Appellant. (R. at 134).

Before advising Appellant on Article 117a offenses, the military judge explained he discussed the elements of Article 117a, UCMJ, with counsel in an R.C.M. 802 conference. (R. at 234). He also stated that he reviewed the "military judge's bench book that is kept current through the Army Trial Judiciary's website," Executive Order 14062, and Hiser. (R. at 234).

Appellant's guilty plea was accepted, and the plea agreement was executed. (*Entry of Judgment*, ROT Vol 2; App. Ex. XXVII.) Appellant was sentenced to four months confinement

for Charge V, Specification 1, and four months for Charge V, Specification 2. (Entry of Judgment, ROT, Vol. 2.)

## ARGUMENT

### APPELLANT'S PLEAS TO CHARGE V, SPECIFICATIONS 1 AND 2 WERE PROVIDENT.

#### *Standard of Review*

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea are reviewed *de novo*. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008); United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted).

#### *Law and Analysis*

In reviewing the providence of a guilty plea, courts consider the appellant's "colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007). A military judge abuses his discretion when accepting a plea if he does not ensure the accused provides an adequate factual basis to support the plea during the Care inquiry. *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); Inabinette, 66 M.J. at 322; *see also* R.C.M. 910(e). When reviewing the adequacy of an appellant's plea, this Court affords the military judge "significant deference," Inabinette, 66 M.J. at 322 (citing United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)), and must uphold a guilty plea unless there is a "substantial basis" in law and fact for questioning the plea. *See* United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022) (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)). In sum, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, the judge must be satisfied that the accused

understands the law applicable to his facts (why he is guilty), and that he is actually guilty. *See* United States v. Medina, 66 M.J. 21, 26 (C.A.A.F. 2008); Jordan, 57 M.J. at 238.

This Court questions whether Appellant's guilty plea to Charge V, Specification 1 and 2 was improvident because Appellant broadcasted the images to another person by showing the screen of his phone to another person without sending the image to the other person's electronic device. The military judge did not abuse his discretion for three reasons. First, the plain language of the statute and canon against surplusage require a reading of Article 117a, UCMJ that prohibits any nonconsensual sharing of intimate images. Second, Article 117a, UCMJ, uses the same definition of broadcast as Article 120c, UMCJ and the definitions should be interpreted similarly. Third, and finally, no substantial error in law or fact exists to question the guilty plea.

Generally, Article 117a, UMCJ, penalizes a service member who "knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who" is at least 18 years old, is identifiable from the image or information displayed in connection with the image, and does not explicitly consent to the broadcast or distribution. 10 U.S.C. § 917a. The visual image was created "under circumstances in which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a *reasonable expectation of privacy* regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct." 10 U.S.C. § 917a.

### *A. This Court should interpret the plain language of Article 117a, UCMJ, to include the sharing of intimate images even if the image is not sent to another person's electronic device.*

The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a

statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) (internal quotation marks omitted) (citations omitted). CAAF and this Court "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." United States v. Pease, 75 M.J. 180, 184 (C.A.A.F. 2016). "Statutes should be interpreted to give meaning to each word." United States v. Adcock, 65 M.J. 18, 24 (C.A.A.F. 2007). If the plain meaning of a statute is unclear, then courts "look next to the legislative history." United States v. Falk, 50 M.J. 385, 390 (C.A.A.F. 1999).

Broadcast, as charged in this case, "means to electronically transmit a visual image with the intent that it be viewed by a person or persons." 10 USCS § 917a(b)(1). "Electronically transmit" is not defined by Article 117a, UMCJ. But "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (Thomas/West 2012) (discussing the ordinary-meaning canon of statutory interpretation). "The plain language will control, unless use of the plain language would lead to an absurd result." United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007).

Electronic means "of, relating to, or utilizing devices constructed or working by the methods or principles of electronics" and "of, relating to, or being a medium (such as television) by which information is transmitted electronically." Electronic, MERRIAM WEBSTER DICTIONARY (Online Ed. 2023). Transmit means "to send or convey from one person or place to another." Transmit, MERRIAM WEBSTER DICTIONARY (Online Ed. 2023). Inserting these everyday meanings into the definition of broadcast, it would mean using an electronic device to

send out or convey an image through medium (such as *television*) with the intent that it be viewed by a person or persons. Under the broadcast theory of liability, the plain langue of the statute does not require another electronic device to receive the image.

Looking at the statute as a cohesive statutory scheme, Article 117a, UCMJ, defines two methods of sharing intimate images: broadcasting and distributing. Distribute means "to deliver to the actual or constructive possession of another person, including transmission by mail or electronic means." 10 USCS § 917a(b)(2). Broadcasting only requires electronic transmission to another person while distribution requires delivery via mail or electronic means to another person.

As defined by Congress, broadcasting would rightly criminalize scenarios where an accused shows his phone screen to another or uses his computer to project the image on a television to be seen by others. But in each of these scenarios the image cannot be found on the viewer's electronic devices or in the control of the viewer. Showing an intimate image to another person on the screen of a phone transmits the image, the image is conveyed or shown to another person and goes from electronic phone screen to the viewers eyes and mind. Meanwhile, distribution criminalizes delivery "to the actual or constructive possession of another person." 10 U.S.C. § 917(b)(2). Thus, distribution criminalizes an accused sending the image to the recipient via text message or email, and once the image is sent and received in the recipient's inbox the recipient could controls the image.

But broadcasting the image on a screen, does not require delivery of the image "to the actual or constructive possession" of the viewer. 10 U.S.C. 917a(b)(2) If this Court requires a broadcasted image to make its way through two different electronic devices – that of the sender and the recipient – before the act is considered criminal, then the next definition of "distribute" is

rendered meaningless because it is subsumed by the first definition of "broadcast." *See* 10 U.S.C. § 917(b)(1-2). But this Court should not interpret the statute to render one of the enumerated definitions hollow. *See* Yates v. United States, 135 S. Ct. 1074, 1085, 191 L. Ed. 2d 64 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.")

The policy behind the law is built into the text of the statute. The goal is to protect an individual's "expectation of privacy" in their consensually produced intimate images. 10 U.S.C. 917a(a)(2). Congress intentionally delineated between broadcasting an intimate image and distributing an intimate image, and both were implemented to broadly prohibit "nonconsensual *sharing* of sexual images." 163 Cong. Rec. H3053 (Daily ed. May 2, 2017) (statement of Rep. Lee) (emphasis added). Showing an image using a phone's screen and sending the image via text message both violate a victim's privacy in the same way. The image has now been *shared* with another person. With this purpose in mind, it is hard to believe Congress intended this legislation to be interpreted with a glaring loophole where the act of showing an image on a phone screen is not criminalized but sending that same image via text message is. And this Court should not interpret Article 117a, UCMJ, to create such a loophole.

### *B. Article 117a, UCMJ, uses the same definition of broadcast as Article 120c, UMCJ and the definitions should be interpreted similarly.*

Neither this Court nor our sister services have ruled on whether showing a photo on a screen constitutes broadcasting in violation of Article 117a, UCMJ. But both the Navy Marine Corps Court of Criminal Appeals (NMCCA) and the Army Court of Criminal Appeals (ACCA) have discussed the definition of "broadcast" within Article 120c, UCMJ. The definitions in Article 117a and Article 120c for "broadcast" are identical: "The term 'broadcast' means to electronically transmit a visual image with the intent that it be viewed by a person or persons."

*Compare* 10 U.S.C. § 917a(b)(1), *with* 10 U.S.C. § 920c(d)(4). Viewing the statutory structure of the UCMJ as a cohesive scheme, the definition of "broadcast" in Article 117a, UCMJ, should be interpreted just like the definitions of "broadcast" in Article 120c, UCMJ.

The NMCCA interpreted the meaning of broadcast within the context of Article 120c, UCMJ, in its published opinion, United States v. Lajoie. 79 M.J. 723, 726 (N.M. Ct. Crim. App. 27 November 2019). In Lajoie, the appellant was convicted of broadcasting a video that he recorded without the victim's consent in violation of Article 120c, UCMJ. 79 M.J. 723, 726. Then the appellant played the intimate video on his cell phone for other Marines to view, but he did not send it to the other Marines' electronic devices. Id. The military judge ruled and NMCCA affirmed that such an act constituted a "broadcast." Id. at 727. Using the plain language of the statute and MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) the court held "'broadcast' means to use an electronic device to send out an image through space or a medium with the intent that it be viewed by a person. We find no textual requirement for another electronic device to receive the image." Lajoie, 79 M.J. at 727 This Court should follow the logic of the NMCCA.

The ACCA interpreted "broadcast" more narrowly in United States v. Davis for Article 120c. 2018 CCA Lexis 417 (A. Ct. Crim. App. 16 August 2018) (unpub. op.). The ACCA decided, "The definition of distribution allows for a physical or an electronic transference whereas the definition of broadcast is limited to only an electronic transference." Davis, 2018 CCA LEXIS 417, *25-26. But the ACCA's narrow reading renders the definition of "broadcast" meaningless because it is eaten up by the definition of "distribution," thus violating canon of surplusage. This Court should not follow the ACCA's reasoning in Davis.

### *C. The military judge did not abuse his discretion because he properly laid out the law he used on the record, applied the law to the facts, and found an adequate factual basis to find Appellant's plea provident.*

This Court will afford the military judge significant deference and will only set aside a guilty plea if there is a "substantial basis" in law and fact for questioning the plea. Inabinette, 66 M.J. at 322. Such a basis does not exist in this case. The military judge reviewed the law available to him (Executive Order 14062 and Hiser), and he reviewed the secondary materials regularly consulted by practicing military judges (Military Judge's Benchbook). (R. at 234). He also identified analogous case law in Lajoie and Davis, two cases with different interpretations of the term broadcast under Article 120c, UMCJ. But case law directly addressing the definition of broadcast in Article 117a, UMCJ, was unavailable and such case law has not developed since Appellant's court-martial. The military judge used the resources available to inform his decision, and this Court should give him great deference in his decision to find Appellant's plea provident.

The military judge reviewed the law, and addressed the definition of broadcast with trial defense counsel to ensure he used the correct elements and definitions for Appellant's Care inquiry. (R. at 134).

> [Military Judge]: And so the cases that I referred you to discuss identical terms as are related through Article 120c. This was United States v. Lajoie and Davis, which I have previously described on the record. We came back in. You all entered those pleas. It's clearly implied or suggested if not definitively answered that having reviewed those you are confident that the definition of broadcast is capable of capturing the accused showing through his cellular phone other people images as is captured in Charge V and its specifications. Is that correct that you are confident and that you believe that that does meet the requirements of broadcast?
>
> [Circuit Defense Counsel]: Correct, Your Honor.
>
> [Military Judge]: Thank you. Government, do you agree as well?

[Circuit Trial Counsel]: Yes, sir. We do.

(R. at 282-283). A substantial basis in law does not exist for questioning the plea because the military judge took the necessary steps to review and apply the law to the facts of Appellant's case. Inabinette, 66 M.J. at 322. What's more he discussed the elements and definitions with trial counsel, and more importantly, trial defense counsel ahead of the Care inquiry to ensure all the parties agreed on them. (R. at 282-283).

Further, a substantial basis in fact does not exist to question the adequacy of Appellant's guilty plea. Inabinette, 66 M.J. at 322. The military judge entered a detailed Care inquiry with Appellant to establish his guilt. (R. at 235-256; 257-266). Here, the military judge ensured Appellant understood what he did (shared intimate images of CM on his phone with others), why he was guilty ( CM did not consent to the broadcast), and that he was actually guilty (he shared the image voluntarily and doing so harmed CM). *See* Medina, 66 M.J. at 26; Jordan, 57 M.J. at 238.

A substantial basis in law or fact does not exist to question the plea. The military judge did not abuse his discretion and this Court should uphold Appellant's plea as provident.

## CONCLUSION

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

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MATTHEW D. TALCOTT, Colonel, USAF
Director
Government Trial and Appellate Operations Division
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FOR

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 September 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40282** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Cody R. JENNINGS** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 3** |

Oral argument is hereby ordered on the following issue:

> **WHETHER APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 2 OF CHARGE V OF WRONGFUL BROADCASTING OF INTIMATE VISUAL IMAGES WERE PROVIDENT WHEN THE CONDUCT ADMITTED BY APPELLANT CONSISTED OF DISPLAYING IMAGES ON HIS CELLULAR PHONE FOR OTHERS TO VIEW.***

Accordingly, it is by the court on this 27th day of September, 2023,

**ORDERED:**

Oral argument in the above-captioned case will be heard at a location, time, and date to be set by future order of this court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

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* *See* Article 117a(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 917a(b)(1) ("The term 'broadcast' means to electronically transmit a visual image . . . ."); *United States v. Lajoie*, 79 M.J. 723, 727 (N.M. Ct. Crim. App. 2019); *United States v. Davis*, ARMY 20160069, 2018 CCA LEXIS 417, at *27 (A. Ct. Crim. App. 16 Aug. 2018) (unpub. op.), *aff'd on other grounds*, 79 M.J. 329 (C.A.A.F. 2020).

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

| | |
|---|---|
| UNITED STATES,<br><br>*Appellee*<br><br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS<br>United States Air Force,<br><br>*Appellant* | **NOTICE OF APPEARANCE OF COUNSEL**<br><br>Case No. ACM 40282<br><br>Before Panel No. 3<br><br>27 October 2023 |

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

COMES NOW, Maj. Nicole Herbers, pursuant to rule 12(a) of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. Maj Herbers is assigned to the Appellate Defense Division and her contact information is in the signature block below.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Air Force Government Trial and Appellate Operations Division on 27 October 2023.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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

| | | |
|---|---|---|
| **UNITED STATES** | ) | **NOTICE OF APPEARANCE OF** |
| *Appellee* | ) | **GOVERNMENT COUNSEL** |
| | ) | |
| v. | ) | Before Panel No. 2 |
| | ) | |
| Staff Sergeant (E-5) | ) | No. ACM 40282 |
| **CODY R. JENNINGS** | ) | |
| United States Air Force | ) | 30 October 2023 |
| *Appellant* | ) | |

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

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

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force


**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 30 October 2023.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force
[redacted]

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

| | |
|---|---|
| UNITED STATES,<br><br>*Appellee*<br>v.<br><br>Staff Sergeant (E-5)<br>CODY R. JENNINGS<br>United States Air Force,<br><br>*Appellant* | **NOTICE OF APPEARANCE OF COUNSEL**<br><br>Case No. ACM 40282<br><br>Before Panel No. 3<br><br>31 October 2023 |

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

COMES NOW, Maj Frederick Johnson, pursuant to rule 12(a) of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. Maj Johnson will sit second chair to Maj Herbers at oral argument. Maj Johnson is assigned to the Appellate Defense Division and his contact information is in the signature block below.

Respectfully submitted,

[redacted]
F
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Air Force Government Trial and Appellate Operations Division on 31 October 2023.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]