IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
Airman First Class (E-3), **CHRISTOPHER P. MOOTY, II,** United States Air Force, *Appellant.*	)	No. ACM SXXXXX
	)	1 December 2023

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

On 7 June 2023, a military judge sitting as a special court-martial convened at Royal Air Force Mildenhall, England, convicted Airman First Class (A1C) Christopher P. Mooty, II, contrary to his plea, of one specification of drunken operation of a vehicle, in violation of Article 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 913 (2019). The military judge sentenced A1C Mooty to 20 days hard labor without confinement, reduction to the grade of E-2, and a reprimand. Entry of Judgment, dated 5 July 2023.

On 25 October 2023, the Government purportedly sent A1C Mooty the required notice by mail of his right to appeal to the Air Force Court of Criminal Appeals within 90 days. Pursuant Article 66(b)(1)(A), UCMJ, A1C Mooty files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

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 1 December 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Christopher P. MOOTY II	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

On 1 December 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 7th day of December, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 3.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Airman First Class (E-4) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)	No. ACM 24003 4 March 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Christopher P. Mooty II (Appellant) hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **25 May 2024**. The record of trial was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 88 days have elapsed. On the date requested, 170 days will have elapsed.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
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Joint Base Andrews NAF, MD 20762-6604
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 March 2024.

[redacted]

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5 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24003 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **CHRISTOPHER P. MOOTY, II** United States Air Force, *Appellant.*	)))))))))	**NOTICE OF APPEARANCE** Before Panel No. 3 No. ACM 24003 21 April 2024

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

COMES NOW the undersigned counsel, pursuant to Rule 13 of this Honorable Court's Rules of Practice and Procedure, and enters an appearance as counsel for Appellant.

Respectfully submitted,

[redacted]

JENNIFER M. HARRINGTON, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: jennifer.harrington.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

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

JENNIFER M. HARRINGTON, Maj, USAFR
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 3
Airman First Class (E-3) **CHRISTOPHER P. MOOTY, II** United States Air Force, *Appellant.*	)	No. ACM 24003 30 April 2024

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Maj Jennifer Harrington has been detailed substitute counsel in undersigned counsel's stead and made her notice of appearance on 21 April 2024. A thorough turnover of the record between counsel has been completed. Maj Crouch is expected to be out of the office on convalescent and parental leave for approximately five months beginning June 2024 and her continued representation of Appellant would only delay his appellate review.

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

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 April 2024.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-4) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 3 No. ACM 24003 15 May 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on 24 June 2024. Appellant's case was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 160 days have elapsed. On the date requested, 200 days will have elapsed. However, the record of trial was received by this Court on 26 January 2024, 50 days after docketing. From the date the record of trial was received by this Court to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 6-7 June 2023, Appellant was tried by a military judge sitting as a special court-martial at Royal Air Force Alconbury, United Kingdom. Contrary to his pleas, Appellant was convicted of one charge and one specification of drunken operation of a vehicle in violation of Article 113, Uniform Code of Military Justice (UCMJ). R. at 278. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for 20 days. R. at 296. The convening authority took no action on the findings or the sentence. Record

of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II*, dated 22 June 2023.

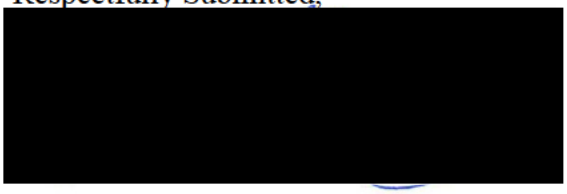
The record of trial is three volumes consisting of six prosecution exhibits, eight defense exhibits, and 16 appellate exhibits. The transcript is 297 pages. Appellant is not confined. Undersigned counsel begun, but not completed, reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. Undersigned counsel entered her notice of appearance less than four weeks ago, on 21 April 2024, shortly after completing her two-week annual tour. Since that time, undersigned counsel has been working on other matters in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida. While those duties take priority over undersigned counsel's duties as a Reserve member assigned to the Appellate Defense Division, this case is counsel's only assigned military case and top priority before this Court.

Appellant is aware of his right to speedy appellate review, enlargements of time, and consents to this enlargement of time. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 May 2024.

JENNIFER M. HARRINGTON, Maj, USAF
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16 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY II, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24003 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES	)	**No. ACM 24003**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Christopher P. MOOTY II	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 1 December 2023, Appellant filed with this court a notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A). While Appellant's filing was not accompanied by a record of trial, the court docketed Appellant's case on 7 December 2023. In this court's notice of docketing, it further ordered the Government to "forward a copy of the record of trial to the court forthwith."

On 26 January 2024, the Government forwarded the completed record of trial to this court and Appellant's counsel.

On 14 June 2024 (140 days after Appellant's counsel received the completed record of trial), counsel for Appellant submitted a Motion for Enlargement of Time (Third) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 20th day of June, 2024,

ORDERED:

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

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

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Airman First Class (E-4) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)	No. ACM 24003 14 June 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on 24 July 2024. Appellant's case was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 190 days have elapsed. On the date requested, 230 days will have elapsed. However, the record of trial was received by this Court on 26 January 2024, 50 days after docketing. From the date the record of trial was received by this Court to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 6-7 June 2023, Appellant was tried by a military judge sitting as a special court-martial at Royal Air Force Alconbury, United Kingdom. Contrary to his pleas, Appellant was convicted of one charge and one specification of drunken operation of a vehicle in violation of Article 113, Uniform Code of Military Justice (UCMJ). R. at 278. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for 20 days. R. at 296. The convening authority took no action on the findings or the sentence. Record

of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II*, dated 22 June 2023.

The record of trial is three volumes consisting of six prosecution exhibits, eight defense exhibits, and 16 appellate exhibits. The transcript is 297 pages. Appellant is not confined. Undersigned counsel has completed her review of the record of trial in this case, but has not yet begun to draft a brief.

Through no fault of Appellant, undersigned counsel has been unable to begin her draft of a brief in this matter. Undersigned counsel entered her notice of appearance on 21 April 2024, shortly after completing her two-week annual tour. Since that time, undersigned counsel has completed her review of the Record of Trial and has been working on other matters in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida. While those duties take priority over undersigned counsel's duties as a Reserve member assigned to the Appellate Defense Division, this case is counsel's only assigned military case and top priority before this Court.

Appellant is aware of his right to speedy appellate review, enlargements of time, and consents to this enlargement of time. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully Submitted,

[redacted]
AF

Appellate Defense Counsel
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 June 2024.

JENNIFER M. HARRINGTON, Maj, USAF
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17 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY II, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24003 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES *Appellee,* v. Airman First Class (E-4) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 3 No. ACM 24003 15 July 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on 23 August 2024. Appellant's case was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 221 days have elapsed. On the date requested, 260 days will have elapsed. However, the record of trial was received by this Court on 26 January 2024, 50 days after docketing. From the date the record of trial was received by this Court to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 6-7 June 2023, Appellant was tried by a military judge sitting as a special court-martial at Royal Air Force Alconbury, United Kingdom. Contrary to his pleas, Appellant was convicted of one charge and one specification of drunken operation of a vehicle in violation of Article 113, Uniform Code of Military Justice (UCMJ). R. at 278. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for 20 days. R. at 296. The convening authority took no action on the findings or the sentence. Record

of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II*, dated 22 June 2023.

The record of trial is three volumes consisting of six prosecution exhibits, eight defense exhibits, and 16 appellate exhibits. The transcript is 297 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been unable complete and file AOE since the last enlargement of time was requested. Undersigned counsel entered her notice of appearance on 21 April 2024, shortly after completing her two-week annual tour. Since that time, undersigned counsel has completed her review of the Record of Trial, researched related legal issues, begun drafting AOE, and has been working on other matters in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida. While those duties take priority over undersigned counsel's duties as a Reserve member assigned to the Appellate Defense Division, this case is counsel's only assigned military case and top priority before this Court. Appellate Counsel has time scheduled in July and August to work solely on Appellant's case.

Appellant was provided an update of the status of counsel's progress of his case. Further, Appellant is aware of his right to speedy appellate review, enlargements of time, and consents to this enlargement of time. An enlargement of time is necessary to allow counsel to fully brief Appellant's case and advise Appellant regarding potential errors.

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

Respectfully Submitted,

JENNIFER M. HARRINGTON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 July 2024.

JENNIFER M. HARRINGTON, Maj, USAF
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17 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY II, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24003 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Airman First Class (E-4) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)	No. ACM 24003 13 August 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file Assignments of Error (AOE). Counsel withdraws the previously filed motion of the same date and name and replaces it with this filing to correctly reflect the number of prior enlargements of time. Appellant requests an enlargement for a period of 30 days, which will end on 22 September 2024. Appellant's case was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 250 days have elapsed. On the date requested, 290 days will have elapsed. However, the record of trial was received by this Court on 26 January 2024, 50 days after docketing. From the date the record of trial was received by this Court to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 6-7 June 2023, Appellant was tried by a military judge sitting as a special court-martial at Royal Air Force Alconbury, United Kingdom. Contrary to his pleas, Appellant was convicted of one charge and one specification of drunken operation of a vehicle in violation of Article 113, Uniform Code of Military Justice (UCMJ). R. at 278. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for

20 days. R. at 296. The convening authority took no action on the findings or the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II*, dated 22 June 2023.

The record of trial is three volumes consisting of six prosecution exhibits, eight defense exhibits, and 16 appellate exhibits. The transcript is 297 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been unable complete and file AOE since the last enlargement of time was requested. Undersigned counsel entered her notice of appearance on 21 April 2024, shortly after completing her two-week annual tour. Since that time, undersigned counsel has completed her review of the Record of Trial, researched related legal issues, begun drafting AOE, and has been working on other matters in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida. While those duties take priority over undersigned counsel's duties as a Reserve member assigned to the Appellate Defense Division, this case is counsel's only assigned military case and top priority before this Court. Appellate Counsel has time scheduled in September to work solely on Appellant's case.

Appellant was provided an update of the status of counsel's progress of his case. Further, Appellant is aware of his right to speedy appellate review, enlargements of time, and consents to this enlargement of time. An enlargement of time is necessary to allow counsel to fully brief Appellant's case and advise Appellant regarding potential errors.

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

Respectfully Submitted,

JENNIFER M. HARRINGTON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 August 2024.

JENNIFER M. HARRINGTON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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14 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY II, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24003 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 August 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)	No. ACM 24003 12 September 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on 22 October 2024. Appellant's case was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 280 days have elapsed. On the date requested, 320 days will have elapsed. However, the record of trial was received by this Court on 26 January 2024, 50 days after docketing. From the date the record of trial was received by this Court to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 6-7 June 2023, Appellant was tried by a military judge sitting as a special court-martial at Royal Air Force Alconbury, United Kingdom. Contrary to his pleas, Appellant was convicted of one charge and one specification of drunken operation of a vehicle in violation of Article 113, Uniform Code of Military Justice (UCMJ). R. at 278. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for 20 days. R. at 296. The convening authority took no action on the findings or the sentence.

Record of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II*, dated 22 June 2023.

The record of trial is three volumes consisting of six prosecution exhibits, eight defense exhibits, and 16 appellate exhibits. The transcript is 297 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been unable complete and file AOE since the last enlargement of time was requested. Undersigned counsel entered her notice of appearance on 21 April 2024, shortly after completing her two-week annual tour. Since that time, undersigned counsel has completed her review of the Record of Trial, researched related legal issues, and has nearly completed the draft AOE, in addition to working on other matters in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida. While those duties take priority over undersigned counsel's duties as a Reserve member assigned to the Appellate Defense Division, this case is counsel's only assigned military case and top priority before this Court. Appellate Counsel set aside time earlier this month in order to draft AOE, and has additional time set aside later this month and in October, to finalize the same. Counsel requests the additional time to confer with the Appellant regarding the draft AOE and to ensure sufficient time for review and final edits.

Appellant was provided an update of the status of counsel's progress of his case. Further, Appellant is aware of his right to speedy appellate review, enlargements of time, and consents to this enlargement of time. An enlargement of time is necessary to allow counsel to fully brief Appellant's case, advise and confer with Appellant regarding potential errors, and to finalize the current draft AOE.

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

Respectfully Submitted,

JENNIFER M. HARRINGTON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 September 2024.

JENNIFER M. HARRINGTON, Maj, USAF
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13 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY II, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24003 Panel No. 3

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 September 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **CHRISTOPHER P. MOOTY II,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH) - OUT OF TIME** Before Panel No. 3 No. ACM 24003 16 October 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time to file Assignments of Error (AOE). As a result of complications from Hurricane Milton, Counsel for the Appellant[1] respectfully files this motion out of time. Appellant requests an enlargement for a period of seven days, which will end on 29 October 2024. Appellant's case was docketed with this Court on 7 December 2023. From the date of docketing to the present date, 314 days have elapsed. On the date requested, 327 days will have elapsed. However, the record of trial was received by this Court on 26 January 2024, 50 days after docketing. From the date the record of trial was received by this Court to the present date, 264 days have elapsed. On the date requested, 277 days will have elapsed.

On 6-7 June 2023, Appellant was tried by a military judge sitting as a special court-martial at Royal Air Force Alconbury, United Kingdom. Contrary to his pleas, Appellant was convicted of one charge and one specification of drunken operation of a vehicle in violation of Article 113, Uniform Code of Military Justice (UCMJ). R. at 278. The military judge sentenced Appellant to be

[1] Counsel resides in Orlando, Florida.

reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for 20 days. R. at 296. The convening authority took no action on the findings or the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II*, dated 22 June 2023.

The record of trial is three volumes consisting of six prosecution exhibits, eight defense exhibits, and 16 appellate exhibits. The transcript is 297 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been unable complete and file AOE since the last enlargement of time was requested. Undersigned counsel entered her notice of appearance on 21 April 2024, shortly after completing her two-week annual tour. Since that time, undersigned counsel has completed her review of the Record of Trial, researched related legal issues, completed her initial draft of AOE and has been working on other matters in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida. While those duties take priority over undersigned counsel's duties as a Reserve member assigned to the Appellate Defense Division, this case is counsel's only assigned military case and top priority before this Court.

Appellate Counsel dedicated time in September and scheduled time earlier this month to work solely on Appellant's case, with the expectation of filing AOE no later than 22 October 2024. As a result of Hurricane Milton, Counsel was unable to dedicate all of the previously planned days in October to finalize Appellant's case. On 9-10 October 2024, Hurricane Milton crossed the state of Florida. Leading up to the arrival of Hurricane Milton, Counsel spent significant time preparing her home, for what was expected to be a category 5 storm when it made landfall. Following the storm, Counsel was without electricity on two separate occasions and spent significant time cleaning up debris in the aftermath. Counsel sincerely apologizes for this out-of-time filing, and

respectfully requests the additional seven days to confer with Appellant regarding the draft AOE and to ensure sufficient time for any necessary final edits.

Appellant was provided an update of the status of counsel's progress of his case. Further, Appellant is aware of his right to speedy appellate review, enlargements of time, and consents to this enlargement of time. An enlargement of time is necessary to allow counsel to fully brief Appellant's case, advise and confer with Appellant regarding potential errors, and to finalize the draft AOE.

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

Respectfully Submitted,

JENNIFER M. HARRINGTON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

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

JENNIFER M. HARRINGTON, Maj, USAF
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18 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) CHRISTOPHER P. MOOTY II, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME ACM 24003 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time 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]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 October 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Airman First Class (E-3) **CHRISTOPHER P. MOOTY, II,** United States Air Force, *Appellant.*	)	No. ACM 24003
	)	29 October 2024

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

Assignments of Error

I.

WHETHER THE FINDING OF GUILT IS FACTUALLY SUFFICIENT WHEN THE EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT A1C MOOTY WAS DRUNK WHILE DRIVING HIS VEHICLE.

II.

WHETHER THE MILITARY JUDGE ERRED IN HOLDING THAT THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT PROTECT A SERVICEMEMBER'S FUNDAMENTAL RIGHT TO A PANEL OF MEMBERS AT COURT-MARTIAL.

Statement of the Case

On 6-7 June 2023, Airman First Class (A1C) Christopher P. Mooty, II was tried at Royal Air Force Alconbury, United Kingdom, by a military judge sitting as a special court-martial under Article 16(c)(2), Uniform Code of Military Justice (UCMJ), [1] 10

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

U.S.C. § 816(c)(2). Contrary to his pleas, the military judge convicted A1C Mooty of one charge and one specification of physically controlling a vehicle while drunk, in violation of Article 113, UCMJ, 10 U.S.C. § 913. R. at 278. The military judge sentenced A1C Mooty to be reprimanded, to be reduced to the grade of E-2, and to perform hard labor without confinement for twenty days. R. at 296. The convening authority took no action on the findings or the sentence. Record of Trial, Convening Authority Decision on Action – *United States v. A1C Christopher P. Mooty, II,* 22 June 2023.

On 25 October 2023, A1C Mooty was notified of his right to submit a Direct Appeal. Notice of Right to Submit Direct Appeal, 25 October 2023. On 1 December 2023, A1C Mooty submitted his notice to this Court, and the Court docketed his case on 7 December 2023. Notice of Docketing, 7 December 2023.

Statement of Facts

In the late evening through the early morning of 3 and 4 March 2023, A1C Mooty went out with two of his fellow airmen, TTH and JE. R. at 229. Over the course of approximately four hours, starting around 2200, the group went to two different bars, spending approximately two hours at each. *Id*. at 232-33.

At A1C Mooty's court-martial, the sole witness to testify about that evening's events was TTH. Though also drinking that evening, TTH estimated that at the first bar, A1C Mooty was drinking "some beers," or "probably around 2, 3." *Id*. at 231-32. TTH saw A1C Mooty with a drink consistently throughout the night, but did not know exactly how many drinks A1C Mooty actually had. *Id*. at 246.

At the second bar, The Ark, TTH estimated that A1C Mooty had between two-to-three drinks. *Id*. at 236. Again, TTH didn't know with any level of confidence the actual number of drinks A1C Mooty consumed while at The Ark, and when asked on cross-examination if he ever actually saw A1C Mooty getting drinks while at The Ark, he replied, "I'm not sure." *Id*. at 247.

Following their two-hour stint at The Ark, the trio took a taxi to JE's residence. *Id* at 236. This was about a twenty-three-minute drive. *Id*. at 237. Then, after spending approximately thirty minutes at JE's, around 0400 or 0430, the group drove in A1C Mooty's car to get food about ten-to-fifteen minutes away. *Id*. at 237-38, 251-52.

According to TTH, JE was visibly intoxicated that evening. *Id*. at 249. By contrast, TTH testified that A1C Mooty did not show any signs of intoxication that night. *Id*. at 248. A1C Mooty walked and acted normally. *Id*. at 248-49. When A1C Mooty was driving, which was at least an hour after leaving The Ark, A1C Mooty drove normally. *Id*. at 249. After getting food, A1C Mooty dropped TTH and JE off at JE's residence. *Id*. at 245.

At this time, A1C Mooty was in some type of romantic relationship with RH. R. at 239, Pros. Ex. 4. On the night in question, RH messaged A1C Mooty. R. at 238-40. A1C Mooty responded to RH in hopes of seeing her. Pros. Ex. 4. But RH did not go out to the bars with A1C Mooty that evening (R. at 229). Nor is it clear when, or if, RH personally observed A1C Mooty relative to the time she sent the messages that followed. RH's message responses implied that A1C Mooty was drunk, and she thanked A1C

Mooty "for the proof I can show your boss :)." *Id.* RH followed through, becoming the source of the court-martial allegation against A1C Mooty (R. at 165, 179, 212) though she refused to testify at A1C Mooty's trial. App. Ex. III at 22, 37.

Days later, three Senior Non-Commissioned Officers (SNCOs) called A1C Mooty into an office and, after advising him of of his Article 31 rights, asked if he "had operated a motor vehicle within the last week with alcohol in his system," or words to that effect. *Id.* at 163, 177. A1C Mooty said, "[N]o." *Id.* at 177. The SNCOs asked what A1C Mooty did the prior weekend, and A1C Mooty stated that he went to a pub with friends and had a beer. *Id.* He also stated that he got food, went to a club where he had a few vodka and Red Bulls, and then split a taxi ride. *Id.* According to one of the SNCOs, A1C Mooty stated that he "had one beer at the pub, and two to three vodka Red Bulls at the club." *Id.* at 178. The SNCOs then confronted A1C Mooty with the messages between A1C Mooty and RH. *Id.* at 179. These messages were introduced[2] as Prosecution Exhibit 4, and the text follows:

[A1C Mooty]:	Chris is driving right now so his messages not be exactly what hes trying to say but he means well
[RH]:	HES FUCKING WHAT
	HAHAHAHAHAHAHA
	Incredible
	Honestly fucking incredible

[2] Ultimately, the messages labeled as coming from A1C Mooty were admitted for their truth, while the messages purportedly from RH were admitted only for their effect on A1C Mooty. No date or time information was provided, and the content of the messages was not explained at trial by any witness.

I should just tell base en

Rn

Also nothing about lying to my face is “meaning well”

[A1C Mooty]: Can i come see you?

I just dropped [JE’s] dumb ass off

[RH]: Hope you get caught

After fucking screaming about it so much

You actually do itm

Unreal

Youre fucking unbelievable

[A1C Mooty]: Yea i understand. If you cba to see me

[RH]: Not like you can go back to base [clown emoji]

[A1C Mooty]: I can stay here. I would just rather see you

[RH]: Then come here

Why the fuck did you drive

[A1C Mooty]: Because [JE] is a fucking retard

[RH]: Oh yes let’s blame the passenger shall we

[A1C Mooty]: And he got lost somewhere in bury

[RH]: One word: taxi

[A1C Mooty]: Im not blaming him im telling you whats goong on

[RH]: Two words: google maps

[A1C Mooty]: Hes pissed rn

[RH]:	SO ARE YOU
	AMD YOU FUCKING DROVE
	YET YOU WOULDN'T COME AND SEE ME AFTER ONE BOTTLE
	No fucking offence mate but even if my dear old nan was lost I wouldn't be fucking driving
	[Redacted message]
[A1C Mooty]:	Youre right
[RH]:	Anyway thanks for the proof I can show your boss :)
[A1C Mooty]:	Im just trying to be superman
	[Crying emoji]
	If youre gonna incriminate me then just get it over with.
[RH]:	So
	I'm gonna try again
	Chris
	Do you remember drunk driving to my house
[A1C Mooty]:	Yes whats going on

Pros. Ex. 4.

In response to these messages, A1C Mooty attempted to request counsel, stating he'd "like to talk to someone." R. at 182. According to one of the SNCOs, this statement required clarification. What A1C Mooty said next varied slightly amongst the recollections of the two SNCOs who testified during the Government's case-in-chief. Version one was something to the effect of "[Y]ou clearly have evidence that I've done

this, I'm not going to hide anything, yes I did." *Id*. at 182. And version two from the other SNCO was, "[W]hat's the point, you know I did it." *Id*. at 218.

Argument

I.

THE EVIDENCE DEMONSTRATES THAT A1C MOOTY DRANK BEFORE HE DROVE HIS CAR BUT IS FACTUALLY INSUFFICIENT BECAUSE IT FAILED TO PROVE THAT A1C MOOTY WAS DRUNK WHILE DRIVING.

Standard of Review

This Court reviews issues of factual sufficiency de novo. Article 66(d), UCMJ, 10 U.S.C. § 866(d); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

This Court "may affirm only such findings of guilty . . . 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). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). For offenses occurring after 1 January 2021, the UCMJ specifies this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). If

"the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding."[3] *Id*.

Two conclusions are required to meet this "clearly convinced" standard: " First, [this Court] must decide that the evidence, *as* [this Court] *has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [the Court] must be clearly convinced of the correctness of this decision." *United States v. Harvey*, ___ M.J. ___, 2024 CAAF LEXIS 502, at *12 (C.A.A.F. 2024) (emphasis in original).

The evidence failed to support beyond a reasonable doubt that A1C Mooty was drunk at the same time he was driving. To prove the charged offense, the Government needed to prove that A1C Mooty, while in physical control of a vehicle, was intoxicated at such a level as to impair the rational and full exercise of his mental or physical faculties. *See* DD Form 458, *Charge Sheet*; 2019 *MCM*, Part IV, ¶¶ 51.b., 51.c.(6). While the Government introduced evidence that A1C Mooty consumed alcohol and later drove a car, it failed to prove that A1C Mooty was impaired at any time that evening, let alone *while* he was in physical control of a vehicle.

The evidence introduced at trial included only one witness that was with A1C Mooty on the night of 3 March 2023 to the early morning hours of 4 March 2024—TTH. JE never testified. RH, to the extent she might have observed A1C Mooty that night,

[3] This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024); Article 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. § 866(d)(1)(B)(iii) (2024 *MCM*).

never testified. TTH, as the sole eyewitness, testified that on 4 March 2023, A1C Mooty was walking, speaking, and driving normally and that A1C Mooty was not showing signs of intoxication. The only conclusion supported by TTH's testimony was that A1C Mooty was *not* impaired while driving or at any other time.

And it is not as if TTH could not spot intoxication when he saw it. Indeed, TTH discerned that their other friend, JE, was intoxicated that night, not A1C Mooty.

The remaining evidence presented by the Government consisted of (1) the messages with RH, an aggrieved romantic partner who refused to testify and who admitted to her own ill will towards A1C Mooty and motive to get him into trouble with his chain of command, and (2) A1C Mooty's own statements to his chain of command. But A1C Mooty never admitted that he drove his car drunk.

In the messages with RH, it was RH who implied A1C Mooty was driving drunk, but there is no evidence to support her allegation. The messages introduced contain no date or time stamps to account for when these messages were sent and received. And although there appear to be acronyms, colloquial phrases which can have multiple meanings, and typographical errors throughout, none of the Government's witnesses provided any clarity as to the meaning, subtext, or context behind these messages, with the exception of the very first message sent by TTH. They exist in a vacuum, with no context concerning the relationship between the two parties, no ability to confront the sender about her motivation, and no details to explain the timing and intent behind the messages. They exist solely to explain how A1C Mooty reacted to seeing them when confronted by the SNCOs.

There is no evidence RH made any observations while she was accusing him of being drunk. After RH berates A1C Mooty via back-to-back messages, A1C Mooty chose not to argue. "Youre [sic] right," he said. Pros. Ex. 4. She accused A1C Mooty of driving drunk because she wanted "proof I can show your boss." *Id.* Seemingly unsatisfied that his attempt at keeping the peace was not sufficient enough to get him in trouble, she again sent a series of back-to-back messages, asking if A1C Mooty recalled driving to her house drunk. And though it appears he answered in the affirmative, because there is no context, and no time stamps on those messages, it is unclear what A1C Mooty's "Yes whats going on" was actually in response to. *Id.*

Was the "yes" in response to RH's drunk driving accusation? Or was it meant not as a response to the allegation, but rather as an acknowledgment of the communications, typed out by A1C Mooty and sent nearly simultaneously with RH's accusation? The latter explanation seems to align with the volume of messages sent in a row by RH, in which RH is seemingly trying to get A1C Mooty's attention, by sending, (1) "So," (2) "I'm gonna try again," and (3) "Chris." *Id.* To those messages alone, a response of, "Yes whats going on" is perfectly ordinary. However, assuming A1C Mooty's "yes" was in response to RH's accusation of drunk driving, the question still remains whether RH's accusation of "drunk driving to [her] house" and A1C Mooty's agreement, was in reference to the very instance of driving that A1C Mooty was charged with. Nonetheless, the motives behind her allegation that A1C Mooty drove drunk are clear—to get A1C Mooty in trouble. But the allegations are unsupported by evidence and incredible.

Moreover, A1C Mooty did not admit to driving *while* drunk to his chain of command. The SNCOs asked A1C Mooty if he "had operated a motor vehicle within the last week with alcohol in his system." To this question, A1C Mooty eventually acknowledged he had – but driving a car with alcohol in his system is not a crime. He was not asked if he was drunk or impaired, or whether he had control over any of his faculties, and what A1C Mooty understood any of those terms, or the law regarding drinking and then driving, to be. The Government needed to prove that A1C Mooty was drunk while driving, and having some alcohol in your system does not equate to being drunk. *United States v. Marion*, No. ACM 33299, 2000 CCA LEXIS 268 (A.F. Ct. Crim. App. 6 Nov. 2000). The Government was required to prove more than just alcohol in his system – and it failed.

In *Marion*, this Court overturned SrA Marion's conviction because the Government failed to prove he was drunk at the time he was controlling his vehicle, finding that "[d]rinking indeed is not necessarily the same as being drunk." *Id*. at *6. Two police officers encountered SrA Marion asleep and difficult to wake, in the back seat of a vehicle that was parked half on a road and half on a sidewalk at 0600. *Id.* at *3. SrA Marion smelled of alcohol and had bloodshot eyes, was confused, and repeatedly said he wanted to go back to sleep. *Id*. at *4. The officers determined that he had been drinking and ordered him not to drive for five hours. *Id*.

SrA Marion's convictions had seemingly inculpatory statements on par with those in A1C Mooty's case. At 0750 SrA Marion called his roommate at work to tell him that he was unable to "drive in" because he had been at a club the prior

night drinking. *Id.* He also told his roommate that he had been ordered by the two officers not to drive. *Id.* At 0915 the roommate returned home where he found the car parked out front and SrA Marion asleep in the house. *Id.* At 1430 the roommate woke SrA Marion who said that he had driven home after he woke up. *Id.* At trial, when asked if SrA Marion was drunk one officer replied, "The indications show that he had been drinking indeed." *Id.* at *6. But the officers could not say SrA Marion was drunk when they found him, and they could not say that he was drunk when he drove a vehicle at an undetermined time between 0600 and 0915. Accordingly, even with the statements that SrA Marion could not drive due to his drinking, this Court set aside the charge, holding that "[d]rinking indeed is not necessarily the same as being drunk." *Id.*

Here, the facts do not even support that A1C Mooty showed any signs of impairment on the night he drove. The Government's own eyewitness testified that A1C Mooty showed no signs of intoxication. According to TTH, A1C Mooty had a few drinks over the course of the evening but walked, talked, and acted normally – unlike JE, whom TTH testified was drunk.

If in the situation of *Marion*, where there existed circumstantial evidence of Marion's impaired faculties, the Government failed to present sufficient evidence to prove Marion was drunk, the proof misses the mark here. All the Government was able to prove with respect to A1C Mooty's level of intoxication was that A1C Mooty had been drinking that evening, and "drinking indeed is not necessarily the same as being drunk." *Id.* The Government presented no evidence that police received complaints or

bystanders observed that A1C Mooty was swerving or otherwise operating his vehicle in a drunken manner. The Government presented no evidence that A1C Mooty appeared drunk at the restaurant where the trio got food. And the Government presented no evidence that those in the car with A1C Mooty believed he was drunk. In short, the weight of the Government's evidence demonstrates that A1C Mooty was not drunk that evening.

Further, despite having approximations of the amount of alcohol A1C Mooty consumed and a rough timeline of the night, the Government did not call upon a toxicologist to testify as an expert witness. The Government presented zero scientific evidence to explain how and/or the rate at which alcohol is absorbed, neutralized, and eliminated from the body, or the factors that play a role in the effect of alcohol on the body. And the Government did not only have to prove that at some point that night, A1C Mooty was drunk, which they failed to do, but they had to prove that A1C Mooty was drunk at the time he physically controlled a vehicle. It remains unclear from the record what point in time, or during which instance of driving, the military judge found A1C Mooty to have been drunk. Was it the drive from JE's residence to get a bite to eat, no less, but possibly more, than an hour after A1C Mooty had his last drink? Was it the drive back to JE's residence after having eaten? Or was it even later, based on the suggestion that A1C Mooty drove off after dropping off JE and TTH? Having relied only on testimony from TTH that A1C Mooty had consumed alcohol and sometime later drove a car, and A1C Mooty's subsequent admission to that fact, the Government failed to meet its burden that A1C Mooty was drunk while driving.

The evidence against A1C Mooty was limited to direct testimony that A1C Mooty was *not* impaired, whether driving or otherwise, and vague admissions that never reached the essential component of impairment *while* driving. A fresh, impartial review of the facts demonstrates the Government did not prove that A1C Mooty was "drunk" when he physically controlled a vehicle. 2019 *MCM,* Part IV, para. 51.c.(6).

WHEREFORE, A1C Mooty respectfully requests this Honorable Court set aside the finding of guilty and sentence and dismiss the Specification and Charge with prejudice.

II.

A1C MOOTY WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PANEL OF MEMBERS AT COURT-MARTIAL.

Additional Facts

In the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Congress amended Article 16, UCMJ, by creating a special court-martial composed of a military judge and no members. Pub. L. No. 114-328, § 5161, 130 Stat. 2000 (2016); 10 U.S.C. § 816(c). The result of the amendment, and corresponding amendment to Article 19, UCMJ, 10 U.S.C. § 819, is that a convening authority may refer charges to a special court-martial at which an accused is not permitted to elected to be tried by members. Under Article 19, UCMJ, an accused so tried cannot receive (1) confinement in excess of six months, (2) forfeitures in excess of six months, or (3) a punitive discharge. 10 U.S.C. § 819(b).

Congress placed no limitations on the type of offenses that could be brought to this forum, delegating that authority to the President. 10 U.S.C. §§ 816(c)(2), 819(a). The President prescribed only two limitations, both under R.C.M. 201(f)(2)(E). The Rule provides that an accused may object to trial by judge-alone special court-martial if (1) the maximum authorized confinement for the alleged offense would be greater than two years if tried by a general court-martial (except if the specification alleges wrongful use or possession of a controlled substance in violation of Article 112a(b) or an attempt thereof); or (2) the specification alleges an offense that would require sex offender notification. R.C.M. 201(f)(2)(E).

The convening authority referred the charge and specification against A1C Mooty. If prosecuted at a general court-martial, the maximum punishment would have included six months of confinement, forfeiture of all pay and allowances, and a bad-conduct discharge, as well as a reprimand, fine, and reduction to the lowest enlisted pay grade. 2019 *MCM*, Part IV, ¶ 51.d.(2); R.C.M. 1003(b). But, employing his authority under R.C.M. 201(f)(2), the Convening Authority referred the Charge to trial under Article 16(c)(2)(A), UCMJ, dictating a forum of military-judge alone.

At trial, the military judge explained the limited circumstances under which A1C Mooty could object to this forum. R. at 9-11. As those R.C.M. 201 bases did not apply, A1C Mooty did not object on either ground. R. at 9-11. He did, however, file a motion to dismiss the charge against him for lack of jurisdiction, arguing that the referral of his case to a judge-alone special court-martial violated his rights under the Fifth and Sixth Amendments to the Constitution. Appellate Ex. XII (citing U.S. CONST.

amend. V-VI). After denying A1C Mooty's motion to dismiss, the Military Judge convicted and sentenced A1C Mooty. Appellate Ex. XIV; R. at 278, 296.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Due Process Clause of the Fifth Amendment provides that no one shall be "deprived of life, liberty, or property without due process of law." U.S. CONST. amend V. Although Congress may authorize courts-martial "without all the safeguards given an accused by Article III and the Bill of Rights," *Reid v. Covert*, 354 U.S. 1, 19 (1957) (citing *Dynes v. Hoover*, 61 U.S. 79 (1857)), the Court of Appeals for the Armed Forces (CAAF) has been unequivocal that "the Due Process Clause of the Fifth Amendment applies to a service member at a court-martial." *United States v. Graf*, 35 M.J. 450,460 (C.A.A.F. 1992) (citing *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

A military accused has a constitutional, due process right to a multi-member panel. *See United States. v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (internal citation omitted). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend VI. While a court-martial panel is not identical to a Sixth Amendment "jury," the constitutional guarantee of an impartial multi-member factfinder for "all criminal prosecutions" is a bedrock procedural right that the Supreme Court recognizes as "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."

Duncan v. Louisiana, 391 U.S. 145, 158 (1968). Indeed, an impartial, multi-member panel is the "*sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995) (citing *Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Mack*, 41 M.J. 51 (C.M.A. 1994); *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985)).

When considering due process challenges to the military justice system, the Supreme Court has applied a balancing test, asking "whether the factors militating in favor" of a particular procedural safeguard "are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44; *see also Weiss v. United States*, 510 U.S. 163, 177-79 (1994). In Article 16, Congress struck no balance regarding the historic right to a multi-member panel at a criminal trial. Congress instead deferred to the President to set limitations for a new, mandatory judge-alone special court-martial. *See* R.C.M. 201(f). While courts must give particular deference to the determination of *Congress* made under its authority to regulate the land and naval forces, *Weiss*, 510 U.S. at 177 (internal quotation marks and citation omitted), no similar deference is owed the President. And the right to a multi-member panel at a criminal trial outweighs any balance struck by the President in R.C.M. 210(f).

In weighing the servicemember's interests in a procedural right against the needs of the military, the Court must consider (1) historical practice with respect to the procedure at issue, *Weiss*, 510 U.S. at 179, (2) the effect of the asserted right on the military, *Middendorf*, 425 U.S. at 45, and (3) the existence in current practice of other

procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment, *Weiss*, 510 U.S. at 181.

The consideration of these factors cuts squarely in A1C Mooty's favor. Courts-martial have determined guilt by a panel of members since the establishment of our nation's armed forces. The military has for nearly 250 years efficiently and properly disciplined servicemembers without the aid of mandatory judge-alone courts-martial that strip accuseds of their right to a multi-member panel. *United States v.* Anderson, 83 M.J. 291, 294 (C.A.A.F. 2023) (citing to nonunanimous court-martial verdicts in the 1775 Articles of War). To find otherwise is to ignore that, historically, no such mandatory judge-alone criminal trial has ever existed in the military justice system, nor has one been necessary to maintain discipline. And there is no substitute for this safeguard elsewhere in the military justice system. As such, the lower court erroneously held that the protections of the Due Process Clause of the Fifth Amendment do not apply to this new judge-alone forum.

A1C Mooty recognizes that the CAAF's recent decision in *United States v. Wheeler*, ___ M.J. ___ , No. 23-0140, 2024 CAAF LEXIS 479 (C.A.A.F. 2024), binds this Court. However, he continues to raise the issue in anticipation of further litigation on the matter.

WHEREFORE, A1C Mooty respectfully requests this Honorable Court set aside the finding of guilt and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 October 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION**
	)	**FOR ENLARGEMENT**
Appellee,	)	**OF TIME (FIRST)**
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3)	)	No. ACM 24003
CHRISTOPHER P. MOOTY, II,	)	
United States Air Force	)	19 November 2024
Appellant.	)	

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

Pursuant to Rule 23.3(m)(5)-(6), the United States respectfully requests that it be allotted seven additional days to file its answer brief in the above captioned case with this Court, making the new due date Thursday, 5 December 2024.

Appellant filed his notice of direct appeal on 1 December 2023, and his case was docketed with this Court on 7 December 2023. (*Notice of Direct Appeal*, dated 1 December 2024; *Notice of Docketing*, 7 December 2024). On 29 October 2024, Appellant filed his brief with this Court. As of the date of this filing, 348 days have elapsed. From date of docketing until the new due date, 366 days will have elapsed.

There is good cause for the enlargement of time in this case. From 28 October 2024 through 7 November 2024, undersigned counsel attended Gateway, a JAGC training course at Maxwell AFB, Alabama, and during that time the course was her primary duty. In addition, undersigned counsel will be on preapproved leave for the Thanksgiving holiday from 24 November 2024 until 29 November 2024. Undersigned counsel has reviewed Appellant's brief and the 300-page transcript, and this case is undersigned counsel's first priority.

The additional 7 days will accommodate the upcoming holiday and allow undersigned counsel to complete the government's response and allow for supervisory review. No other counsel can file a brief sooner, as they have been assigned other cases.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion for an enlargement of time of seven days to file an answer brief in the above captioned case.

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CERTIFICATE OF SERVICE

I certify that the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 19 November 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24003**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Christopher P. MOOTY, II	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 19 November 2024, government appellate counsel submitted a Motion for Enlargement of Time (First) requesting an additional 7 days to submit Appellant's assignments of error.

Government appellate counsel asserts the following grounds for "good cause" for granting the motion: "28 October 2024 through 7 November 2024, undersigned counsel attended Gateway, a JAGC training course at Maxwell AFB, Alabama, and during that time the course was her primary duty. In addition, undersigned counsel will be on preapproved leave for the Thanksgiving holiday from 24 November 2024 until 29 November 2024."

The court has considered the Government's motion, the lack of opposition from Appellant, the case law, and this court's Rules of Practice and Procedure. We determine good cause exists to grant the Government's motion, but with a caveat: we find no "good cause" attributable to scheduled holidays and family days. These holidays are known by all counsel as a matter of course and planning one's practice around holidays is a routine part of military duty and legal practice. We take this opportunity to caution both government and defense appellate counsel that motions for enlargement of time owing solely or primarily to foreseeable grounds for delay attributable to personal time off (be it scheduled leave or scheduled holidays) will ordinarily not be viewed favorably.

As we have recently re-affirmed in our rulings on defense motions for enlargements of time, this court is mandated to process appeals in a timely manner. *See*, *e.g.*, *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals.").

Accordingly, it is by the court on this 27th day of November, 2024,

ORDERED:

Appellee's Motion for Enlargement of Time (First) is **GRANTED**. Appellee shall file a reply brief not later than **5 December 2024**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Airman First Class (E-3) **CHRISTOPHER P. MOOTY, II,** United States Air Force *Appellant.*	)	No. ACM 24003
	)	5 December 2024

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

ISSUES PRESENTED

I.

WHETHER THE FINDING OF GUILT IS FACTUALLY SUFFICIENT WHEN THE EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT [APPELLANT] WAS DRUNK WHILE DRIVING HIS VEHICLE.

II.

WHETHER THE MILITARY JUDGE ERRED IN HOLDING THAT THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT PROTECT A SERVICEMEMBER'S FUNDAMENTAL RIGHT TO A PANEL OF MEMBERS AT COURT-MARTIAL.

STATEMENT OF CASE

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

The convening authority referred Appellant's Charge and Specification to a military judge alone forum under Article 16(c)(2)(A), UCMJ. (*Charge Sheet*, dated 18 April 2023, ROT Vol. 1 at 2). At trial, Appellant pleaded not guilty. (R. at 160). A military judge sitting alone as a special court-martial found Appellant guilty of the Charge and its Specification. (R. at 278).

The military judge sentenced Appellant to 20 days hard labor without confinement, reduction to the grade of E-3, and a reprimand. (*Entry of Judgment*, dated 5 July 2023, ROT, Vol. 1). The convening authority took no action. (*Convening Authority Decision on Action*, dated 22 June 2023, ROT, Vol 1).

STATEMENT OF FACTS

Around 2200 hours on 3 March 2023 Appellant, SrA TTH, and SrA JE drove in a cab to the Yard, a local pub, leaving Appellant car at JE's house. (R. at 229-230, 231, 238). During the one to two hours they were at the Yard hanging out and drinking, TTH never saw Appellant without a drink. (R. at 231, 232). TTH estimated that Appellant drank two or three beers while he was at the Yard. (R. at 232).

Around 2330 hours, the group then migrated to the Ark, a pub with a club in it, and again the three drank and talked. (R. at 232, 233). All the while, Appellant had a drink in front of him. (R. at 236). Again, TTH never saw Appellant without a drink during their time at the Ark. (Id.). Appellant drank two or three drinks during the one to two hours they spent at the Ark. (R. at 234, 236). Around 0200 hours, the three friends loaded themselves into a taxi and rode the 23-minutes from Newmarket to JE's house in Bury Saint Edmunds. (R. at 236-237). After about 30 minutes, hunger overtook them, and they hopped into Appellant's car to acquire kebabs ten minutes away. (R. at 238). Appellant drove. (R. at 238). After getting their food, the three returned to JE's house around 0400 hours, Appellant once again drove them. (R. at 238).

While Appellant chauffeured the group to and from the kebab shop, he received Instagram messages from RH, and the car audio notified everyone in the car of the incoming message and the identity of the sender. (R. at 239). Appellant responded to RH's messages by handing his unlocked phone to TTH and dictating a message to her. (R. at 240). On Appellant's

behalf, TTH wrote, "Chris is driving right, now so his message [sic] not be exactly what hes [sic] trying to say but he means well."[1] (Pros. Ex. 4 at 1). Appellant dropped JE and TTH off at JE's house, and he left. (R. at 245-246).

Appellant texted RH, "I just dropped jesse's [sic] dumb ass off." (Pros. Ex. 4 at 2). And he asked RH if he could visit her that night. (Id.). RH berated Appellant for driving while intoxicated[2] and Appellant responded "I'm just trying to be superman … If you're going to incriminate me then just get it over with." (Id. at 3). RH then texted Appellant, "Do you remember drunk driving to my house," and Appellant agreed that he drove drunk when he responded, "Yes whats [sic] going on." (Id. at 4).

RH sent Appellant's leadership a copy of the texts that Appellant sent her on the night of 3 March 2023 to the morning of 4 March 2023. (Pros. Ex. 4; R. at 179). Then SMSgt SC, SMSgt GH, and MSgt JC investigated Appellant's statement in the text messages that he drove drunk. (Pros. Ex. 4; R. at 165). Appellant's leadership team brought him in for questioning and informed him of his rights, and they showed him a prepared Air Force Form 1168 that stated he was being investigated for a violation of Article 113, "[d]runken or reckless operation of a vehicle, aircraft, or vessel." (Pros. Ex. 3 at 1; R. at 166). Appellant agreed that he understood his rights by initialing next to each individual right listed on the AF Form 1168. (Id.).

When asked what he did that weekend, Appellant said that "he had gone out to a pub [The Yard] with friends, had a beer. That he had gone to get food, gone to a club [the Ark], had

[1] The military judge ruled that Appellant authorized TTH to make the statement on Appellant's behalf, so it was admissible as a non-hearsay party opponent statement. (R. at 244). Eventually, the military judge ruled that all Appellant's statements in Prosecution Exhibit 4 were admissible as non-hearsay. (R. at 258).

[2] The military judge admitted RH's text messages only for the effect on the listener – Appellant. (R. at 258).

a few vodka Red Bulls there, and then split a taxi ride home." (R. at 177). He then claimed he did not know why someone would report him for drunk driving. (Id.). Then leadership confronted him with the messages between him and RH. (Pros. Ex. 4). The initial message TTH sent indicated Appellant was driving. (Id. at 1). RH angrily messaged him asking, "Why the fuck did you drive[?]" To which Appellant responded, "Because jesse is fucking retard." (Id.) Appellant's response affirmed that he drove and then provided a reason for doing so. At the end of Appellant's conversation with RH, she said, "Do you remember drunk driving to my house" and Appellant responded, "Yes whats [sic] going on." (Pros. Ex. 4 at 6). Once the messages were read to him by his leadership, Appellant stated, "[Y]ou clearly have evidence that I've done this, I'm not going to hide anything, yes I did," or words to that effect. (R at 182, 193).

The government charged Appellant with physical control of a vehicle while drunk in violation of Article 113, UCMJ. The Charge against Appellant stated that Appellant "did within the United Kingdom, on or about 4 March 2023, in the county of Suffolk, physically control a vehicle, to wit: a passenger car while drunk." (*Charge Sheet*, ROT Vol. 1 at 2).

ARGUMENT

I.

APPELLANT WAS DRUNK WHEN HE WAS DRIVING HIS VEHICLE. THUS, THE FINDING OF GUILT IS FACTUALLY SUFFICIENT.

Standard of Review

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

occurred on or after 1 January 2021,[3] factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 6 September 2024).

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

A. The government provided evidence for both elements of the offense demonstrating that Appellant physically controlled his vehicle, and he was drunk when he did so.

The government presented evidence beyond a reasonable doubt to show that Appellant was in physical control of a vehicle while drunk. To prove Appellant physically controlled a vehicle while drunk, the government needed to prove that (1) the accused was in physical control of a vehicle, and (2) the accused was drunk or impaired while in physical control of the vehicle. Manual for Courts-Martial, United States, pt. IV, ¶ 51.b.[4] The government did so through eyewitness testimony and Appellant's own statements.

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

[4] All citations to the Manual for Courts-Martial refer to the 2019 edition unless otherwise stated.

Looking at the first element, the government proved that Appellant physically controlled a vehicle – his own passenger car. Physical control means "the present capability and power to dominate, direct, or regulate the vehicle . . . either in person or through the agency of another, regardless of whether such vehicle . . . is operated." MCM, pt. IV, ¶ 51.b.(c)(5). According to THH's sworn testimony, Appellant drove his own car and took TTH and JE to the kebab shop approximately 10 minutes from JE's house and then drove them all back to JE's house. (R. at 238). While Appellant chauffeured the group to and from the kebab shop, he received Instagram messages from RH. (R. at 239). Appellant responded to RH's messages by handing his unlocked phone to TTH and dictating a message to be sent to RH. (R. at 240). On Appellant's behalf, TTH wrote, "Chris is driving right, now so his message [sic] not be exactly what hes [sic] trying to say but he means well." (Pros. Ex. 4 at 1).

TTH's testimony and Appellant's statement to RH prove that Appellant had the present "capability and power to . . . direct . . . the vehicle" from JE's house to the kebab shop and back. This Court can reasonably conclude that Appellant ensured he had his keys and started the vehicle. Then he demonstrated the power to direct the vehicle by navigating the streets of Bury Saint Edmunds from JE's house to the kebab shop 10 minutes away. (R. at 236-237). Appellant's statement that he was driving at the time RH's messages were received and TTH's eyewitness testimony placed him behind the wheel of his car and in physical control of the vehicle. The government proved the first element of the offense.

Looking at the second element, the government proved that Appellant was drunk when he physically controlled the vehicle. To prove the second element of this offense, the government may show that an accused either was drunk ***or*** had an "alcohol concentration in the person's blood or breath is equal to or exceeds the applicable limit," but an alcohol concentration is not

required to be guilty of the offense. 10 U.S.C. § 913(A)(2). Drunk means "any intoxication [by alcohol] which is sufficient to impair the rational and full exercise of the mental or physical faculties." MCM, pt. IV, ¶ 51.b.(c)(6).

In his sworn testimony, TTH stated he saw Appellant drink four to six drinks over a four-hour period, and then TTH was in the car when Appellant drove it just an hour after leaving the last bar. (R. at 231-238). TTH explained even when he had seen Appellant drunk on other occasions that he did not see him swear, mumble, or wobble. (R. at 235). On that evening in March, TTH did not remember seeing Appellant stumble or slur his words. (R. at 249). But outward signs of drunkenness, though helpful, are not required to demonstrate Appellant was drunk. "A deliberate, voluntary confession of guilt is among the most effective proofs in the law." United States v. Monge, 1952 CMA LEXIS 917, 1 C.M.A. 95, 97, 2 C.M.R. 1, 3 (C.M.A. 1952). Appellant provided effective proof when he affirmed that he drove drunk to RH and SMSgt GH.

In this case, Appellant affirmed his drunken state in his messages to RH and then to SMSgt GH a few days later. (R at 182, 193; Pros. Ex. 4 at 3-4). RH texted Appellant, "Do you remember drunk driving to my house," and Appellant agreed that he drove drunk when he responded, "Yes whats [sic] going on." (Id. at 4). Appellant affirmed that he drove while drunk by answering RH's question affirmatively – Yes, he did remember driving drunk that night. Then a few days later, SMSgt GH read Appellant his Article 31 rights and specifically explained Appellant was being investigated for a violation of Article 113, UCMJ, drunken or wanton operation of a vehicle. (Pros. Ex. 3 at 1). Appellant acknowledged that he knew what he was in trouble for. (Id.) When SMSgt SC, SMSgt GH, and MSgt JC confronted Appellant about his weekend endeavors, Appellant said that "he had gone out to a pub [The Yard] with friends, had a

beer. That he had gone to get food, gone to a club [the Ark], had a few vodka Red Bulls there, and then split a taxi ride home." (R. at 177). Appellant admitted to drinking that night.

When SMSgt GH confronted Appellant with his messages to RH, Appellant said, "[Y]ou clearly have evidence that I've done this, I'm not going to hide anything, yes I did," or words to that effect. (R at 182, 193). Because he had been read his rights, Appellant understood the entire conversation with SMSgt GH revolved around an allegation of drunk driving. When he said, "yes, I did it," he was saying he drove while drunk. Appellant, as the one feeling the effects of alcohol, would have been in the best place to determine if his mental or physical faculties were sufficiently impaired. MCM, pt. IV, ¶ 51.b.(c)(6). The government need not provide a blood alcohol content to prove drunkenness, evidence of "***any*** impairment" is all that is required. Id. (emphasis added). Appellant, as the best person to determine whether he was impaired, provided evidence of his drunken state in his statements to RH and SMSgt GH. The government proved the second element of the offense.

B. Appellant failed to trigger factual sufficiency review because he did not demonstrate a specific deficiency in proof.

Appellant failed to demonstrate a specific deficiency in proof because witness testimony and Appellant's own admissions supported each element of the offense. Factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 2024). As amended, Article 66(d)(1)(B)(i) "eliminat[ed] a CCA's duty, ***and power***, to review a conviction for factual sufficiency absent an appellant" meeting both triggers. Id. (internal citations omitted) (emphasis added). Appellant asserted factual sufficiency as an assignment of error, (App. Br. at 7), but a deficiency of proof does not exist.

Because Appellant did not meet both threshold elements for review by demonstrating a deficiency in proof, this Court lacks the power to perform a factual sufficiency review.

Appellant does not contest that he drove his car; thus, the first element is not deficient of proof. Appellant focuses on the second element arguing that the government failed to put on any evidence that Appellant was drunk when he drove. (App. Br. at 8). But the government provided eyewitness testimony from TTH that Appellant drank four to six alcoholic beverages throughout the evening and only an hour later he drove TTH, and JE to the kebab shop.

Then the government admitted Appellant's messages to RH and statement to SMSgt GH in which he agreed that he was drunk while driving. (R at 182, 193; Pros. Ex. 4 at 3-4). Pretrial trial defense counsel filed a motion to suppress Appellant's statements, but the military judge determined Appellant's oral statements to RH and SMSgt GH were voluntary and admitted them. (App. Ex. VI at 9). "[A] voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession." Hopt v. Utah, 110 U.S. 574 (1884). Because his voluntary statements of guilt are the strongest evidence against Appellant, the second element is not deficient in proof.

Appellant admitted he was drunk while driving and the eyewitness testimony put him behind the wheel after drinking alcohol. Appellant has not met his burden to show a deficiency in proof; thus, this Court should decline to review for factual sufficiency.

C. Even if this Court decides Appellant met both threshold elements to trigger factual sufficiency review, the weight of the evidence supports the conviction.

The weight of the evidence supports Appellant's conviction for physically controlling a vehicle while drunk. If this Court decides that both threshold triggers for factual sufficiency review are met, then this Court may "weigh the evidence and determine controverted questions

of fact." 10 U.S.C. § 866(d)(1)(B)(ii). Giving appropriate "deference to the fact that the trial court saw and heard the witnesses and other evidence," this Court must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

To be "clearly convinced," this Court must meet two requirements: (1) "the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt;" and (2) this Court "must be clearly convinced of the correctness of this decision." Harvey, 2024 CAAF LEXIS 502 at *12.

Appellant relies heavily on United States v. Marion for the proposition that "having some alcohol in your system does not equate to being drunk." (App. Br. at 11); United States v. Marion, 2000 CCA LEXIS 268, *7 (A.F. Ct. Crim. App. 6 November 2000) (unpub. op.). Appellant argues that "this Court overturned SrA Marion's conviction because the Government failed to prove he was drunk at the time he was controlling his vehicle, finding that '[d]rinking indeed is not necessarily the same as being drunk.'" (App. Br. at 11). But Appellant misstates the facts of Marion. The Court set aside Marion's conviction because he was not in physical control of the vehicle, rather he was in the back seat asleep, and the government failed to admit evidence of when he drove the vehicle to his house. Marion, 2000 CCA LEXIS 268, *7. Although the keys were in the ignition, Marion was sound asleep in the back seat and the Court ultimately determined that he could not have physically controlled the vehicle from the back seat while asleep. Marion, 2000 CCA LEXIS 268, *7. In this case, TTH witnessed Appellant drinking throughout the evening and then saw him behind the wheel providing approximate times for Appellant's drinking and driving. Appellant was in actual physical control of the vehicle, driving less than an hour after drinking. Witness testimony established that Appellant

had been drinking the entire night while out at the bars and had consumed at least four to six drinks – which is a significant amount of alcohol. And by admitting he was drunk, Appellant confessed that his faculties were impaired by alcohol – something he would be able to evaluate and understand as someone who consumed alcohol in the past. (R. at 235) (TTH testified Appellant drank with him on previous occasions.). Appellant did not just drink some alcohol and drive; he drank enough alcohol to feel the effects of it and determine he was drunk. This incident was more than having alcohol in his system, the alcohol inhibited the full exercise of his mental and physical capabilities.

Appellant also argues that "[a]ccording to TTH, A1C Mooty had a few drinks over the course of the evening but walked, talked, and acted normally – unlike JE, whom TTH testified was drunk." (App. Ex. at 12). But this Court, using its common sense, understanding and knowledge of the ways of the world, can conclude that different people present different symptoms of alcohol consumption. Some people become obviously drunk while others remain outwardly poised, but that does not mean they are sober. Appellant's own admissions to RH and SMSgt GH affirm that he felt the effects of alcohol, and "***any*** intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties" constitutes drunkenness under Article 113. MCM, pt. IV, ¶ 51.b.(c)(6) (emphasis added). The weight of the evidence supports the conviction beyond a reasonable doubt, and this Court should not be "clearly convinced that the finding of guilty was against the weight of the evidence." 10 U.S.C. § 866(d)(1)(B)(iii). This Court should affirm the finding of guilt and decline to "dismiss, set aside, or modify the finding, or affirm a lesser finding." Id. This Court should deny this assignment of error.

II.

APPELLANT DID NOT HAVE A FIFTH AMENDMENT DUE PROCESS RIGHT TO A COURT-MARTIAL CONSISTING OF A PANEL OF MEMBERS AT A MILITARY JUDGE ALONE SPECIAL COURT-MARTIAL UNDER ARTICLE 16(C)(2)(A), UCMJ.

Additional Facts

Ahead of trial, Appellant filed a motion to dismiss the Charge and its Specification claiming that the judge alone special court-martial was unconstitutional. (App. Ex. XII). The military judge denied Appellant's motion to dismiss. (App. Ex. XIV).

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021).

Law and Analysis

Appellant's Fifth Amendment due process right was not violated when the convening authority referred his charge to a judge alone special-court-martial under Article 16(c)(2)(A), UCMJ. United States v. Wheeler, 2024 CAAF LEXIS 479, *2 (C.A.A.F. 22 August 2024). A special court-martial under Article 16(c)(2)(A) cannot adjudge more than six months of confinement or a punitive discharge. 10 U.S.C. 819(b). The convening authority referred Appellant's Charge and Specification to a special court-martial under Article 16(c)(2)(A). (*Charge Sheet*, ROT, Vol. 1). Because Appellant's case was referred to a military judge alone special, our superior court's decision in Wheeler applies in this case and binds this Court.

In Wheeler, the Court of Appeals for the Armed Forces (CAAF) took up the constitutionality of an Article 16(c)(2)(A) special court-martial – ultimately determining the forum was constitutional. Wheeler, 2024 CAAF LEXIS 479. The Court must balance an

Appellant's "procedural rights against the needs of the military." Id. at *8-9. So, the Court considered "(1) historical practice with respect to the procedure at issue, (2) the effect of the asserted right on the military, and (3) the existence in current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment." Id. (internal citations omitted).

Wheeler fell asleep while he was on post. Id. at *1. At a general court-martial, the maximum punishment authorized would have "included a dishonorable discharge, forfeiture of all pay and allowances, and one year of confinement." Id. The convening authority referred the case to an Article 16(c)(2)(A) special court-martial, and the appellant challenged the constitutionality of the forum. Id. Ultimately, CAAF afforded "due deference to Congress' determination that the military judge-alone special court-martial promotes fairness and efficiency." Id. at *17. Although Wheeler demonstrated that the historical practice favored panels of members, the Court found that the military was not negatively affected by the asserted right and adequate procedural safeguards existed within the forum. Id. at *16. Thus, the appellant failed to meet his burden to show that Congress' "determination should not be followed." Id. at *8-9.

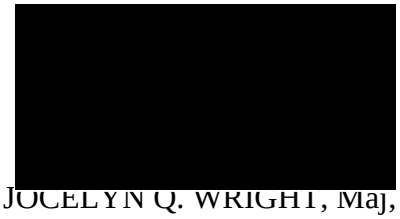
In this case, if Appellant's Charge and Specification had been referred to a general court-martial, the maximum punishment authorized for physical control of a vehicle while drunk, and without personal injury, would have included a "[b]ad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." MCM, pt. IV, ¶ 51.d(2). Appellant would have faced half of the confinement Wheeler faced and a less severe punitive discharge than Wheeler. Thus, if "Congress's determination that the military judge-alone special court-martial promotes fairness and efficiency" in Wheeler's case, then it would also promote fairness and efficiency for

an offense with a lower maximum punishment available at a general court-martial like in this case. Id. at *17.

Lower courts should follow precedent of superior courts that directly controls a case, thus, "leaving to [the superior court] the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997). Because a lower ranking court lacks the discretion to overrule a superior court's precedent, this Court is bound by CAAF's decision in Wheeler. United States v. Allbery, 44 M.J. 226, 228 (C.A.A.F. 1996). Appellant even "recognizes that the CAAF's recent decision in United States v. Wheeler . . . binds this Court." (App. Br. at 18). This Court should follow CAAF's precedent in Wheeler and find that Appellant did not have a Fifth Amendment due process right to a panel at an Article 16(c)(2)(A) special court-martial. This Court should deny this assignment of error.

CONCLUSION

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



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CERTIFICATE OF FILING AND SERVICE

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

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24003**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Christopher P. MOOTY, II	)	**PANEL CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of December, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge

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 24003**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Christopher P. MOOTY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

Having reviewed the record, this court notes the military judge initially ruled that RH's out-of-court statement—to the effect that Appellant was the "most drunk" she had ever seen him—was excluded under the Confrontation Clause of the Sixth Amendment* because the statement was testimonial and RH was not available as a witness to be subject to examination. However, during trial the military judge later ruled that a witness could testify to the substance of RH's out-of-court statement because the military judge found trial defense counsel's cross-examination of the witness opened the door to RH's statement.

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

> WHETHER, IN LIGHT OF *HEMPHILL V. NEW YORK*, 595 U.S. 140 (2022), THE MILITARY JUDGE VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION BY ADMITTING TESTIMONIAL HEARSAY AFTER FINDING THE DEFENSE OPENED THE DOOR TO THE ADMISSION OF THE EVIDENCE, AND IF SO, WHETHER APPELLANT IS ENTITLED TO RELIEF.

Accordingly, it is by the court on this 21st day of April, 2025,

ORDERED:

---

* U.S. CONST. amend. VI.

Appellant and Appellee shall file briefs on the above-captioned specified issue with the court **not later than 12 May 2025**. No further briefs will be permitted without leave from the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO COURT SPECIFIED ISSUE
v.	)	Before Special Panel
Airman First Class (E-3) **CHRISTOPHER P. MOOTY, II,** United States Air Force *Appellant.*	)	No. ACM 24003 9 May 2025

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

ISSUES PRESENTED

WHETHER, IN LIGHT OF HEMPHILL V. NEW YORK, 595 U.S. 140 (2022), THE MILITARY JUDGE VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION BY ADMITTING TESTIMONIAL HEARSAY AFTER FINDING THE DEFENSE OPENED THE DOOR TO THE ADMISSION OF THE EVIDENCE, AND IF SO, WHETHER APPELLANT IS ENTITLED TO RELIEF.

STATEMENT OF CASE

The convening authority referred Appellant's Charge and Specification to a military judge alone forum under Article 16(c)(2)(A), UCMJ. (*Charge Sheet*, dated 18 April 2023, ROT Vol. 1 at 2). At trial, Appellant pleaded not guilty. (R. at 160). A military judge sitting alone as a special court-martial found Appellant guilty of the Charge and its Specification. (R. at 278). The military judge sentenced Appellant to 20 days hard labor without confinement, reduction to the grade of E-3, and a reprimand. (*Entry of Judgment*, dated 5 July 2023, ROT, Vol. 1). The convening authority took no action. (*Convening Authority Decision on Action*, dated 22 June 2023, ROT, Vol 1).

On 29 October 2024, Appellant filed his assignments of error. On 5 December 2024, the government filed its answer. On 21 April 2025, this Court ordered additional briefing on the specified issue above. (*Order,* dated 21 April 2025).

STATEMENT OF FACTS

After a night of drinking alcohol, Appellant drove his friends, JE and TTH, to a restaurant and then he dropped them off at JE's house, and he drove away. (R. at 231, 232, 234, 236, 238, 245-246.) Appellant texted RH, "I just dropped jesse's [sic] dumb ass off." (Pros. Ex. 4 at 2.) RH berated Appellant for driving while intoxicated[1] and Appellant responded "I'm just trying to be superman … If you're going to incriminate me then just get it over with." (Id. at 3.) RH then texted Appellant, "Do you remember drunk driving to my house," and Appellant agreed that he drove drunk when he responded, "Yes whats [sic] going on." (Id. at 4.)

RH emailed the base Public Affairs office alleging that Appellant drove drunk. (App. Ex. II at 13.) Her messages read, "Tonight at approximately 3:30, Christopher Mooty (USAF) drink [sic] drove from Newmarket to Bury St. Edmunds." (Id.). The Public Affairs team forwarded the message to Appellant's leadership who followed up with RH to acquire a copy of the Instagram messages that Appellant sent her on the night of 3 March 2023 to the morning of 4 March 2023. (App. Ex. II at 13-21; Pros. Ex. 4; R. at 179.) In the email correspondence between RH and SMSgt GH, RH stated, "He drove at 4am on [Saturday 4th March][2]. Yes, he stayed at my house and left at approximately 3:30pm the next day after sleeping all day." (App. Ex. II at 17.) She also explained that "he did not tell me how much he had drank but yes I saw

[1] The military judge admitted RH's text messages only for the effect on the listener – Appellant. (R. at 258).

[2] RH initially stated that Appellant drove to her house at 4am on "Friday 3rd March" but later corrected the date to Saturday 4th March." *Compare* (App. Ex. II at 17) *with* (App. Ex. II at 16).

him and I have seen him under the influence before but this time was genuinely the most drunk I've ever seen him. I'm surprised he didn't crash/get caught." (App. Ex. II at 16.) After receiving these emails from RH, SMSgt SC, SMSgt GH (First Sergeant), and MSgt SC (Temporary First Sergeant) investigated Appellant's statement in the messages that he drove drunk. (Pros. Ex. 4; R. at 165.)

Trial defense counsel filed a motion in limine to exclude RH's statements as hearsay and for lack of confrontation because she was unwilling to participate in the trial. (App. Ex. VII.) Trial defense moved the court to exclude "[s]tatements made by Ms. [RH] to SMSgt [GH] by email on 7 March 2023." (App. Ex. VII at 2.) Specifically, trial defense counsel identified three categories of statements for exclusion:

> Statements by Ms. [RH] that screenshots of text messages sent from herself to SMSgt [GH] are text messages between herself and A1C Mooty from the late night of 3 March 2023 or the early morning of 4 March 2023, under M.R.E. 804(b)(5).
>
> Statements by Ms. [RH] that[] A1C Mooty was with [JE] at the Yard on the night of the charged offense, under M.R.E. 804(b)(3); and
>
> Statements by Ms. [RH] that A1C Mooty drove to her house on the night of the charged offenses.

(App. Ex. VII at 2-3.) The military judge granted Appellant's requested relief and excluded RH's hearsay statements. (App. Ex. XV at 8.)

MSgt SC was the additional duty First Sergeant in Appellant's unit in March 2023. (R. at 165.) Along with other members of the command team (SMSgt SC and SMSgt GH), he interviewed Appellant about allegations of his drunk driving that the command received via email from RH. (R. at 165.) At trial on direct examination, trial counsel asked why MSgt SC interviewed Appellant. (R. at 164.) He responded, "The interview was to conduct an investigation into an allegation of drink[ing and] drive[ing] that had been made against Airman

Mooty." (R. at 165.) During direct examination trial counsel did not ask about and MSgt SC did not discuss how the command was notified in detail because the military judge's ruling on the defense's motion to exclude RH's hearsay statements prevented such testimony. (App. Ex. XV.)

On cross examination, trial defense counsel asked MSgt SC if he received any reports about Appellant's drunken state.

> [Defense Counsel:] I'm going to hear all my questions too based on your personal knowledge and observations, okay? So, I want you to just answer what you know or what you don't know and not anything that's in the mind of anyone else OK?
>
> [MSgt SC:] Okay.
>
> [Defense Counsel:] You received no report saying that Airman Mooty failed to yield, correct?
>
> [MSgt SC:] No.
>
> [Defense Counsel:] You received no report that he took too long to stop, correct?
>
> [MSgt SC:] No.
>
> [Defense Counsel:] You received no report that he was running over the curb, correct?
>
> [MSgt SC:] No.
>
> [Defense Counsel:] You received no report that Airman Mooty was making extra wide turns on the road, isn't that correct?
>
> [MSgt SC:] That's correct, I did not receive a report like that.
>
> [Defense Counsel:] And you received no report from any witnesses or information that Airman Mooty was slurring his words, correct?
>
> [MSgt SC:] I did not.
>
> [Defense Counsel:] You received no information or report that Airman Mooty had bloodshot eyes, correct?
>
> [MSgt SC:] I did not.

> [Defense Counsel:] And you received no information or report that Airman Mooty smelled of alcohol, correct?
>
> [MSgt SC:] I did not.
>
> [Defense Counsel:] You received no report that –-
>
> [Trial Counsel:] Your Honor, I'm going [o]bject to this entire line of questioning with regard to Airman Mooty's displayed – I guess, observable drunkenness. In that this witness is being asked not to testify to the statements he received regarding Airman Mooty being drunk. You ruled that he could not state this but now the defense is asking these questions and I believe he's answering those trying to avoid the fact that he's aware of the report he did receive of those same things.

(R. at 202-203.)

The military judge summarized trial counsel's objection and ruled:

> So, my understanding of the basis is that the – I have excluded hearsay statements of Ms. [RH]. That this witness read about – Airman Mooty's appearance of drunkenness and so, the witness is answering these questions. Essentially, after having been told not to answer these questions or not to answer as to those statements that he heard from Ms. [RH].
>
> And so – So, here's what I'm going to rule. I'm going to overrule the objection but I'm also going to instruct the witness that if you believe a question calls – if the defense counsel who is the one who – who made the objection to Ms. [RH] statements. Asks you a question that you believe calls for information that you may have seen from Ms. [RH]. You're allowed to answer that question because they made the objection. They can waive that objection and so, if you – if you hear a question that you believe, from defense counsel. That you believe calls for information that you may have received from Ms. [RH]. You can answer that question.

(R. 202-203.) After ruling, the military judge clarified

> So, the questions that were asked were. Whether he received information [] that [Appellant] smelled of alcohol, he had bloodshot watery eyes, he was slurring his words, he's making extra wide turns on the road, running over the curb, that he took too long to stop, that

> he failed to yield. So, government can clarify his responses to those questions, yes.

(R. at 204.)

On redirect, trial counsel addressed trial defense counsel's line of questioning and asked, "What would you have said differently if you were allowed to respond to the defense based on what they asked?" MSgt SC responded, "I don't remember the exact wording of one of the final questions, but I had to pause and consider the wording in an e-mail that Ms. [RH] had sent to the command. Concerning her perception of how drunk he was." (R. at 205.) Trial defense counsel objected, and alleged that the question on cross examination was mischaracterized. (R. at 205.) Before ruling on the objection, the military judge clarified with the witness, "[MSgt SC], which particular question was it that you had to pause and think about the question of an e-mail that you received from Ms. [RH]?" MSgt SC answered, "I believe, sir, the question revolved around his appearance when he was drunk something about his eyes, bloodshot eyes."

The military judge ruled on the defense's objection, and explained:

> So, Defense Counsel, what I have is that you asked him whether he received any report or information that Airman Mooty had bloodshot watery eyes. So, that's the question to which he had to think about an e-mail he may have received from Ms. [RH]. So, I'm going to overrule the objection to the extent that the defense has essentially opened the door with that question.

Trial defense counsel provided additional argument to the military judge claiming that they did not open the door. (R. at 207-208.) The military judge took a recess to consider the case law. (R. at 208.)

The military judge considered persuasive federal court authority, United States. v. Lopez-Medina, 596 F.3d. 716 (10th Cir. 2010). He then explained:

> Specifically, that court's analysis of a similar situation in their statement that the confrontation clause is a shield, not a sword. So,

> I'm thinking only of the fact that defense counsel asked a question. And the question was phrased as whether the witness had received any reports or information to indicate that Airman Mooty had bloodshot eyes. The witness in his mind, understanding his direction he had received not to state any hearsay statements from Ms. [RH]. But thought of a statement by Ms. [RH] indicating that she saw signs of intoxication. If not – didn't see that specific sign, but saw signs of intoxication. Didn't provide that answer because he had been instructed not to but thought it responsive to the question. The court finds that to be a – a fair response.
>
> To the extent that there was a question as to a specific sign of intoxication. The more general answer could be in the mind of a reasonable person responsive to that question. Question didn't call for this witness's personal knowledge it requires to – recalled for whether he had received any information or reports. And so, I find that defense counsel has elicited that answer through their question.

(R. at 210.)

The military judge limited his ruling, and explained, "Now, I'm not going to find that defense counsel somehow opened the door into all of the statements that – Ms. [RH] made that have been excluded." (R. at 210.) But the military judged allowed MSgt SC to respond if trial defense counsel asked a question and some of RH's statements were responsive to the question. (R. at 210-211.) To resolve the issue, the military judge asked, "So, Master Sergeant [SC], the question is did you – did you receive any reports or information that Airman Mooty had bloodshot watery eyes?" (R. at 211.) MSgt SC answered, "Command received an e-mail from Ms. [RH]. That stated something to the effect of that she had – had seen him intoxicated, or other people intoxicated. And he was more drunk, something to that effect. If I could see the e-mail, I could speak to it clearly but." (R. at 212.) The military judge did not allow the witness to see the email, and counsel did not question MSgt SC further on the issue. (R. at 212.)

ARGUMENT

APPELLANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED. TRIAL DEFENSE COUNSEL WAIVED ANY CONFRONTATION CLAIM WHEN THEY ASKED THE WITNESS A QUESTION THAT CALLED FOR PREVIOUSLY EXCLUDED HEARSAY EVIDENCE.

Standard of Review

Whether an appellant waived a constitutional right is a question of law reviewed de novo. United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002).

"We review a military judge's decision to admit or exclude evidence for an abuse of discretion." United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023) (citing United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003)). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." Smith, 83 M.J. at 355 (citing United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Law and Analysis

A. Trial defense counsel waived any confrontation claim by asking MSgt SC whether the command received reports of Appellant's drunken behavior.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Constitution, amend. VI. Appellant's right to confrontation was not violated, and no relief is warranted even considering Hemphill, 595 U.S. 140. Trial defense counsel waived any Confrontation claim when defense counsel asked MSgt SC on cross examination about previously excluded hearsay evidence – RH's email to Public Affairs and Appellant's command team. Trial defense counsel asked MSgt SC if he received any "reports"

of Appellant's drunken state on the night of 3-4 March 2023. MSgt SC thought of the email that RH sent as a report when responding to the question, and mentioning the email was responsive to the defense counsel's question. After arguing the issue, the military judge ensured that MSgt SC's answer was limited to the following: "Command received an e-mail from Ms. [RH]. That stated something to the effect of that she had – had seen him intoxicated, or other people intoxicated. And he was more drunk, something to that effect." (R. at 212.) The email itself was never admitted into evidence and neither trial counsel nor trial defense counsel expanded on MSgt SC's answer. By asking MSgt SC about any "reports" command received, trial defense counsel intentionally relinquished or abandoned a known right to confront RH about the allegations of drunkenness in her email.

"An intentional waiver occurs when a party intentionally relinquishes or abandons a known right." United States v. Hasan, 84 M.J. 181, 239 (C.A.A.F. 2024) (citing United States v. Day, 83 M.J. 53, 56 (C.A.A.F. 2022); United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)). To determine whether a right was intentionally waived, courts consider "the particular circumstances of each case to determine whether there was a waiver." Jones, 78 M.J. at 44. Although a presumption against waiver of constitutional rights exists, an appellant can waive a constitutional right like the right to confront witnesses. United States v. Sweeney, 70 M.J. 296, 303 (C.A.A.F. 2011); United States v. Harcrow, 66 M.J. 154, 157 (C.A.A.F. 2008).

The question of waiver breaks into two parts (1) whether trial defense counsel knew of the known right and (2) whether it was intentionally relinquished. First, trial defense counsel knew of the right to confront RH – the declarant in the email – and they knew that RH's email to Public Affairs and Appellant's command team was testimonial hearsay because it alleged a criminal offense. (App. Ex. VII.) Trial defense counsel successfully litigated the issue in

pretrial motions to ensure that RH's statements, to include her email, were excluded from evidence. (App. Ex. VII, XV.) In the motion in limine, trial defense counsel argued that RH's statements were testimonial hearsay, and they argued that their admission would violate the Confrontation Clause. (Id.) Thus, trial defense counsel demonstrated on the record that they knew of the right.

Second, trial defense counsel intentionally asked questions about whether MSgt SC received any reports about Appellant's drunken state, and specifically asked:

- "And you received no report from any witnesses or information that Airman Mooty was slurring his words, correct?"
- "You received no information or report that Airman Mooty had bloodshot eyes, correct?"
- "And you received no information or report that Airman Mooty smelled of alcohol, correct?"

(R. at 202-203.) Defense counsel did not caveat the terms "information" or "report" with "police report" or "information from law enforcement." A report is defined as "common talk or an account spread by common talk" or "a usually detailed account or statement," and the statements can be formal or informal. Report, MERRIAM WEBSTER'S DICTIONARY (2025 online ed.) In that same vein, information means "knowledge obtained from investigation, study, or instruction" or "the communication or reception of knowledge or intelligence." Information, MERRIAM WEBSTER'S DICTIONARY (2025 online ed.) A person, in this case MSgt SC, hearing the terms "report" or "information" could think of anything from an official police report to an informal notice of misconduct via email. In this case, that phrasing made the witness think of the report of Appellant's drunk driving that RH provided to public affairs and command via email. (R. at 202-203.)

Defense counsel's question called for hearsay because MSgt SC thought of RH's emailed information or report that Appellant was drunk and driving. (R. at 205.) By diving into previously excluded hearsay, trial defense counsel waived the right to confrontation. This was not a situation like Hemphill. In Hemphill, the defendant claimed that he did not commit the murder of a two-year old child. 595 U.S. 140. Instead, Hemphill blamed Morris for the murder. The murder was committed with a 9-millimeter handgun. Id. at 147. To rebut Hemphill's defense that Morris was the shooter, the government submitted Morris' plea allocution in which Morris pleaded guilty to possessing .357 magnum revolver. Id. at 145. The government attempted to show that Morris did not own the right type of gun to have committed the murder. Morris was unavailable to testify in Hemphill's case. Id. at 141. The Supreme Court decided that defendants do not open the door to testimonial hearsay simply by making that evidence relevant via their defense. Hemphill, 595 U.S. at 154.

Here, the government had not asked about RH's email reporting Appellant that triggered the investigation, and trial counsel instructed the witness not to discuss the email either. (R. at 210.) Trial defense counsel affirmatively elicited information about whether MSgt SC received any "report" of Appellant's drunken state and in doing so, elicited testimonial hearsay, intentionally lowering the shield that the Confrontation clause provides.

Justice Alito's concurrence in Hemphill accounted for situations where the trial defense counsel waived a right to confrontation on an appellant's behalf. The concurrence provided several examples of ways that Appellant could impliedly waive his right to confrontation. "[T]he law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.'" Hemphill, 595 U.S. at 157 (J. Alito, concurring) (citing

Berghuis v. Thompkins, 560 U. S. 370, 383-384 (2010)). For example, "a defendant may impliedly waive his right when he introduces incomplete evidence that opposing counsel may further develop under the evidentiary rule of completeness regardless of the evidence's testimonial nature." State v. Joyner, 284 N.C. App. 681, 688 (2 August 2022) (citing Hemphill, 142 S. Ct. at 695, 211 L. Ed. 2d at 549). Appellant did so here when trial defense counsel asked about "any information or reports" knowing that the witness had received an email reporting Appellant's crimes.

This case is distinguishable from the majority opinion in Hemphill and falls squarely within the exceptions provided by the concurrence. "When a defendant introduces the statement of an unavailable declarant on a given subject, he commits himself to the trier of fact's examination of what the declarant has to say on that subject." Hemphill, 595 U.S. at 159 (J. Alito, concurring). By asking questions about whether MSgt SC received reports of signs of Appellant's drunken behavior, Appellant committed himself to the answer: "Command received an e-mail from Ms. [RH]. That stated something to the effect of that she had – had seen him intoxicated, or other people intoxicated. And he was more drunk, something to that effect." (R. at 212.) Defense counsel opened the door to a very narrow area of testimonial hearsay in this case and in doing so waived any Confrontation claim to that narrow evidence that RH emailed command and told them she thought Appellant was drunk when he drove. Trial defense counsel waived any Confrontation claim, and this Court should decline to grant relief on this specified issue.

B. The military judge did not abuse his discretion when he permitted MSgt SC to briefly discuss the testimonial hearsay evidence in response to trial defense counsel's question.

In light of this waiver, the military judge did not abuse his discretion in admitting the testimonial hearsay because the hearsay statement was a fair response to trial defense counsel's

questions that called for the previously excluded hearsay. "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023) (citing United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003)).

The military judge did not have an erroneous view of the law. He cited to United States. v. Lopez-Medina, a case that is factually similar to this case. 596 F.3d 716, 730 (10th Cir. 2010). In Lopez-Medina, the testimonial hearsay statements of a confidential informant were properly admitted because "Lopez-Medina opened the door by questioning Officer Johnson on cross-examination about the information he received from the informant." Id. The military judge agreed with the Tenth Circuit Court's analysis and noted that "the confrontation clause is a shield, not a sword." (R. at 210.) The military judge then explained that MSgt SC "[d]idn't provide that answer because he had been instructed not to but thought it responsive to the question. The court finds that to be a – a fair response." This shows that the military judge understood that trial defense counsel had been the ones to ask a question, the fair answer to which was the previously excluded testimonial hearsay. And the military judge examined the issue through the lens of invited error and fair response. (R. at 210.)

The error was invited because trial defense counsel asked the witness broad questions about "any information or reports," (R. at 202-203), that the command received about Appellant's misconduct. And the witness's answer logically included informal email reports of misconduct from RH. *See* United States v. Sarracino, 2013 CCA LEXIS 752, *18 (A.F. Ct. Crim. App. 20 July 2013) (trial defense counsel may invite error by the military judge). Under the invited error doctrine, Appellant "cannot create error and then take advantage of a situation

of his own making." United States v. Raya, 45 M.J. 251, 254 (C.A.A.F. 1996). Invited error does not provide a basis for relief. United States v. Martin, 75 M.J. 321, 325 (C.A.A.F. 2015).

This case is like United States v. Martin, where the court found no error from the introduction of inadmissible human lie detector testimony where the defense's questioning "foreseeably elicited" such testimony. 75 M.J. 321, 325 (C.A.A.F. 2016). In this case, by asking the questions about any reports and information received by command, trial defense counsel "foreseeably elicited" testimonial hearsay about RH's email from the witness.

This case is also like United States v. Garza, 93 F.4th 913, 916 (5th Cir. 2024). In Garza, the defense counsel used pretrial motions to exclude a statement (the statements was referred to as the "Bedroom Gun statement"). Id. Then "[d]uring trial, the defense affirmatively elicited the very statement it attempted to suppress when cross examining Sgt. Macias [the police officer] in front of the jury." Id. The Fifth Circuit decided that "Garza's affirmative, unprompted injection of the Bedroom Gun statement by drawing it out of Sgt. Macias in the jury's presence opened the door to its use at trial; Garza cannot complain of this 'invited error.'" Id. The Fifth Circuit cited Justice Alito's concurrence in Hemphill, 595 U.S. at 157 (Alito, J., concurring) for the proposition that "observing defendants can waive a right when they 'engage[] in a course of conduct that is incompatible with a demand' to enforce that right." In this case, the defense also used pretrial motions to exclude statements, and then defense asked questions which fairly elicited those statements on cross examination. Trial defense counsel's question to MSgt SC was invited error that the Appellant cannot claim warrants relief on appeal.

United States v. Diggs provides this Court another persuasive analysis using Hemphill. 2022 U.S. Dist. LEXIS 36598, *44-45 (N.D. Ill. 2 March 2022). During his robbery trial, Diggs intentionally elicited hearsay statements or evidence that was based on hearsay throughout his

cross-examinations, and he never timely objected to other hearsay. Id. Ultimately the appellate court decided that the hearsay "rested on the notion that Diggs had forfeited his Confrontation Clause rights as to the challenged testimony by himself eliciting hearsay about [his fellow robber] and by failing to object" to hearsay elicited on cross-examination by his co-defendant until after the cross-examination was over. Id. The appellate court cited Justice Alito's concurrence in Hemphill for the proposition that a defendant can waive the right to confrontation by failing to object and "'engag[ing] in a course of conduct that is incompatible with a demand to confront adverse witnesses.'" Id. (citing Hemphill, 142 S. Ct. at 694 (Alito, J., concurring)). "Having made the choice to introduce the statements of an unavailable declarant, Diggs cannot be heard to complain that he cannot cross-examine that declarant with respect to the declarant's related statements on the same subject." Id. (cleaned up). Here Appellant also elicited testimonial hearsay through his questioning of MSgt SC, and Appellant should not be granted relief because his own questions called for hearsay that was admitted only because Appellant asked about the topic.

The military judge's decision to admit some of the content of RH's email through MSgt SC was within the range of reasonable choices available to him. The courts in Hemphill, Martin, Garza, and Diggs demonstrated that admission of some otherwise inadmissible evidence is allowed when the defense opens the door to it. "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." Smith, 83 M.J. at 355 (citing United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)). Here the military could have admitted none, all, or some of RH's statements once trial defense counsel opened the door to her testimonial hearsay. By choosing to

limit RH's statements, he cured the invited error while prohibiting testimonial hearsay that was not responsive to the trial defense counsel's questions.

Trial defense counsel invited the error; thus, no relief should be provided. This Court should not grant any relief for this specified issue.

C. Even if the testimonial hearsay was erroneously admitted, the admission was harmless beyond a reasonable doubt.

MSgt SC's testimony that RH's email stated that Appellant appeared drunk was harmless beyond a reasonable doubt. The unconfronted testimony – in the judge alone forum – was not important to the prosecution's case because other corroborating evidence existed to show Appellant was drunk and the content of the statement was cumulative. Appellate courts "grant relief for Confrontation Clause errors only where they are not harmless beyond a reasonable doubt." United States v. Sweeney, 70 M.J. 296, 306 (C.A.A.F. 2011) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). "Among other factors, we consider the importance of the unconfronted testimony in the prosecution's case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the prosecution's case." Id.

The unconfronted statement – that RH thought Appellant was drunk – had an extremely limited use, and it was not a pillar of the government's case. Complying with the military judge's ruling, the government did not bring up RH's statements. Only after trial defense counsel asked questions eliciting the testimonial hearsay did the government ask that the witness be permitted to respond in full. Even then the military judge limited the admission of the evidence. References to RH's email were only used to clarify MSgt SC's answer to trial defense counsel's specific questioning about reports that command received. The unconfronted testimony that RH believed Appellant was drunk was not important to the government's case to

prove Appellant's drunk driving offense. The drunk driving offense was proven beyond a reasonable doubt through witness testimony, and Appellant's own statements. The testimony of TTH, provided the necessary corroboration for Appellant's confession. TTH's testimony placed Appellant behind the wheel of his car after drinking. (R. at 229-240; Pros. Ex. 4.) Appellant told his command team that he "did it." (R. at 218.) MSgt SC's testimony about RH's email was not necessary to corroborate the evidence in this case, and her email was not important to the government's case.

In addition, the unconfronted statement was cumulative because TTH testified about Appellant's drinking and placed him behind the wheel. (R. at 229-240.) The hearsay statement that was admitted was that RH "had seen [Appellant] intoxicated, or other people intoxicated. And he was more drunk, something to that effect." (R. at 212.) TTH's testimony provided evidence of Appellant's intoxication level. TTH saw Appellant drink multiple alcoholic drinks, and Appellant always had a drink in front of him. (R. at 231-232, 234, 236.) Then TTH provided evidence that Appellant was driving. He testified that Appellant chauffeured the group to and from the kebab shop, and while Appellant dictated, TTH wrote messages to RH for Appellant. (R. at 239). On Appellant's behalf, TTH wrote, "Chris is driving right, now so his message [sic] not be exactly what hes [sic] trying to say but he means well."[3] (Pros. Ex. 4 at 1). Appellant dropped JE and TTH off at JE's house, and he left. (R. at 245-246). The hearsay statement did not provide any new information to the fact finder that TTH's testimony did not already provide. Thus, the hearsay statement was cumulative.

[3] The military judge ruled that Appellant authorized TTH to make the statement on Appellant's behalf, so it was admissible as a non-hearsay party opponent statement. (R. at 244). Eventually, the military judge ruled that all Appellant's statements in Prosecution Exhibit 4 were admissible as non-hearsay. (R. at 258).

Appellant was unable to confront RH about the contents of the email that she sent to his leadership, but trial defense counsel was able to cross examine MSgt SC. Trial defense counsel voir dired MSgt SC and determined that RH was an unknown actor to the command team, and they did not know much about her. (R. at 183.) By eliciting details that the command team did not know RH or any details about her, trial defense counsel demonstrated that RH's email statements should be given limited weight. Her statements triggered an investigation, but they were not the ultimate basis for the conviction. Appellant's statements and TTH's testimony formed the foundation of the government's case against Appellant.

Even if the testimonial hearsay was erroneously admitted, the admission was harmless beyond a reasonable doubt. The unconfronted testimony was not important to the prosecution's case. The testimony was cumulative. Corroborating evidence supported that Appellant was drunk. And trial defense counsel demonstrated that RH's statements should be given limited weight in the military judge forum. This Court should not grant relief on this specified issue.

CONCLUSION

Trial defense counsel waived any confrontation claim by asking MSgt SC broad questions about whether the command received reports of Appellant's drunken behavior to which RH's testimonial hearsay statements were a fair response. Even if the military judge erred by admitting testimonial hearsay evidence, the error was invited by the defense counsel's questions to MSgt SC. And even if the testimonial hearsay was erroneously admitted, the admission was harmless beyond a reasonable doubt. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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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 9 May 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR LEAVE TO FILE SPECIFIED ISSUE BRIEF OUT OF TIME AND SPECIFIED ISSUE BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Special Panel
Airman First Class (E-3) **CHRISTOPHER P. MOOTY, II,** United States Air Force, *Appellant.*	)	No. ACM 24003
	)	13 May 2025

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

Appellant, Airman First Class (A1C) Christopher P. Mooty, II, by and through his undersigned counsel, files this motion for leave to file his specified issue brief, pursuant to this Honorable Court's order, dated 21 April 2025, out of time.[1] There is good cause to file this brief out of time. Upon receiving this Court's specified issue order, undersigned counsel immediately scheduled leave in her civilian capacity as an Assistant United States Attorney in the Middle District of Florida to complete the instant brief. Undersigned counsel took leave, made significant progress on the specified issue brief, and anticipated having the weekend of 10-11 May 2025 to make necessary edits and finalize the same. Due to medical circumstances, undersigned counsel was unable to finalize the brief during that time and then had competing

[1] Counsel withdraws the previously filed Specified Issue Brief on Behalf of Appellant of the same date and replaces it with this filing to move for leave to file out of time.

responsibilities in her civilian capacity that required her attention on 12 May 2025. Undersigned counsel worked to finalize the instant brief after duty hours on 12 May 2025, in an attempt to meet this Court's filing deadline. However, given the unexpected and debilitating medical event the preceding weekend in conjunction with her responsibilities in her civilian capacity, counsel was unable to do so. Counsel sincerely apologizes for the out-of-time filing, and respectfully requests leave to file the below Specified Issue Brief on behalf of Appellant, out of time.

Whether, in light of *Hemphill v. New York*, 595 U.S. 140 (2022), the military judge violated appellant's Sixth Amendment right to confrontation by admitting testimonial hearsay after finding the defense opened the door to the admission of the evidence, and if so, whether appellant is entitled to relief.

Statement of Facts

On 5 June 2023, A1C Mooty, through trial defense counsel, moved the trial court to exclude certain statements the government noticed under Mil. R. Evid. 807. App. Ex. VII. These included statements made by RH to A1C Mooty's First Sergeant via email on or about 7 March 2023 that she had observed A1C Mooty "under the influence before but this time was genuinely the most drunk [she had] ever seen him." App. Ex. II at 16. The same day, the government responded in opposition. App. Ex. VIII. On 6 June 2023, the court-martial held a hearing to allow the parties to present additional evidence and argument. R. at 113-37. The military judge granted the motion, and excluded RH's statements as testimonial hearsay that was prohibited under the Confrontation Clause of the Sixth Amendment. App. Ex. XV.

The military judge found the following pertinent facts by at least a preponderance of the evidence. Around 7 March 2023, someone calling herself [RH] sent a message to Royal Air Force Mildenhall Public Affairs stating, "Tonight at approximately 3:30, Christopher Mooty (USAF) drink[2] drove from Newmarket to Bury St. Edmunds." *Id*. at 2. The message was forwarded to A1C Mooty's Commander, who forwarded the information to A1C Mooty's First Sergeant for further investigation. *Id*. Following this, the First Sergeant contacted RH by email and asked her about the incident. *Id*. Specifically, he asked her whether she was willing to utilize the email exchange as "official communication." *Id*. He also asked how she knew about the alleged drunk driving, whether she had any physical evidence of the same, and what she wanted to happen because of her report. *Id*. When the First Sergeant engaged in this dialogue, he believed that his investigation could lead to disciplinary action against A1C Mooty. *Id*. RH responded the same day, telling the First Sergeant that she was willing to utilize the email exchange as "official communication." *Id*. She also said A1C Mooty had told her he was drunk when he drove to her house and attached screenshots of Instagram messages she had exchanged with him. *Id*. She said she wanted A1C Mooty to face consequences for his actions. *Id*. On 8 March 2023, the First Sergeant again contacted RH via email and asked whether she saw A1C Mooty on the night in question. *Id*. at 3. RH replied affirmatively, stating that she had observed him "under the influence before but this time was genuinely the most drunk

[2] In the United Kingdom, the offense of driving under the influence is referred to as "drink driving." *See* https://www.gov.uk/drink-drive-limit (last visited May 11, 2025).

[she had] ever seen him." *Id*. RH refused to appear at A1C Mooty's court-martial. *Id*. at 4.

As one of three witnesses in the government's case-in-chief, the government called SC, a Senior Non-Commissioned Officer who received the above-referenced emails between the RH and the First Sergeant. R. at 163, 186. On direct examination, SC testified about his recollection of A1C Mooty's statements to the First Sergeant after A1C Mooty was confronted with purported messages between himself and RH. During cross-examination, trial defense counsel asked SC a series of questions about what evidence of A1C Mooty's intoxication level SC did *not* receive—no breathalyzer, no blood test, and no report of an accident.

Defense Counsel:	The command was never given a breathalyzer, isn't that right? A breathalyzer test for [A1C] Mooty?
SC:	That's correct.
Defense Counsel:	There's no blood test that the command was given?
SC:	That's correct.
. . .	
Defense Counsel:	So, outside of what you testified to regarding the command receiving a notification. There was no report of an accident[?]
SC:	We received no report of an accident.

Id. at 194, 201.

SC also confirmed that he did not receive a report of A1C Mooty slurring his words, having bloodshot eyes, or smelling of alcohol.

Defense Counsel: I'm going to hear all my questions too based on your personal knowledge and observations, okay? So, I want you to just answer what you know or what you don't know and not anything that's in the mind of anyone else, OK?

SC: Okay.

Defense Counsel: You received no report saying that [A1C] Mooty failed to yield, correct?

SC: No.

Defense Counsel: You received no report that he took too long to stop, correct?

SC: No.

Defense Counsel: You received no report that he was running over the curb, correct?

SC: No.

Defense Counsel: You received no report that [A1C] Mooty was making extra wide turns on the road, isn't that correct?

SC: That's correct, I did not receive a report like that.

Defense Counsel: And you received no report from any witnesses or information that [A1C] Mooty was slurring his words, correct?

SC: I did not.

Defense Counsel: You received no information or report that [A1C] Mooty had bloodshot eyes, correct?

SC: I did not.

Defense Counsel: And you received no information or report that [A1C] Mooty smelled of alcohol, correct?

SC: I did not.

Defense Counsel: You received no report that –

Id. at 202-03.

To this line of questioning, the government objected, arguing that the earlier ruling precluding discussion of the email purportedly from RH put SC in a position where "he's answer those trying to avoid the fact that he's aware of the report he did receive of *those same things*." *Id*. at 203 (emphasis added). The government did not ask for reconsideration of the military judge's earlier ruling regarding RH's email, instead objecting to consideration of trial defense counsel's question. *Id*. And the email from RH did not mention a breathalyzer, blood test, accident, slurred words, bloodshot eyes, or smelling of alcohol – as noted above. App. Ex. II at 16. RH provided only her conclusion that A1C Mooty was drunk without explaining how she came to that conclusion. *Id*. Yet, after overruling the government's objection, the military judge did something neither party requested: allowed SC to answer with information he received from RH if SC believed the question called for information SC believed may have come from RH, all "because [trial defense counsel] made the objection. They can waive that objection . . . ." R. at 203-04.

The Government then inquired with the military judge about the cross-examination questions and answers that were already on the record, and whether or not it was permitted to "clarify." *Id*. at 204. The military judge instructed the

government that it could clarify SC's responses to those prior questions. *Id*. at 204. Trial defense counsel then briefly resumed the cross-examination, but abandoned the line of questions regarding the lack of reports. *Id*. at 204-05.

On re-direct, the government asked SC if his answers on cross-examination were affected by instructions that he is not to talk about allegations from RH. SC stated that, to the question of whether he received a report about A1C Mooty having bloodshot eyes, he had to think about an email he "may have received from [RH]." *Id*. at 205-06. Over defense objection, the military judge found that the defense had "essentially opened the door with that question. To what report [SC] may have received on that particular question." *Id*. at 206. After back-and-forth between the parties , the military judge elicited from SC that he had received an email from RH stating that A1C Mooty appeared "very, very drunk," or words to that effect. *Id*. at 206-07. Defense counsel continued to object, arguing that her questions did not open the door to hearsay statements of RH. [3] *Id*. at 205, 208. Further, she argued that SC's response was over-conclusory, and not actually responsive to the question asked, which was specific to whether or not SC received a report describing A1C Mooty as having bloodshot eyes. *Id*. The military judge then took a recess to conduct research, noting the "confrontation clause is a pretty big issue." *Id*. at 208.

The court-martial resumed twenty-five minutes later with the military judge overruling the defense objection. The military judge did so in reliance on *United States*

[3] Lines 4-8 on page 208 of the record incorrectly refer to the declarant as the military judge. Based on the context of the transcript, it is apparent that those statements should be attributed to defense counsel.

v. Lopez-Medina, 596 F. 3d 716 (10th. Cir. 2010), as persuasive authority for allowing SC to answer the government's "clarifying" question. *Id.* at 210. The military judge explained that SC thought of the email from RH when asked the question about receiving a report regarding bloodshot eyes, and found that "more general answer" to be "a fair response," that was "potentially responsive to that particular question." *Id.* As a result, he allowed the question that "arguably called for that particular answer," but found that defense had not opened the door into all of RH's statements. *Id.* at 210-11. Rather than allow the government to re-ask the question, the military judge engaged in the following exchange with the witness:

Military Judge:	So, [SC] the question is did you – did you receive any reports or information that Airman Mooty had bloodshot watery eyes?
SC:	Your Honor, thank you. Command received an e-mail from [RH] that stated something to the effect of that she had – had seen him intoxicated, or other people intoxicated. And he was more drunk, something to that effect. If I could see the e-mail, I could speak to it clearly but.
Military Judge:	So, at this point we're going to – we'll rest on that particular answer. I'm not going to go any further. ***So I'm going to allow that answer and I will consider that answer.***

Id. at 211-12 (emphasis added). Neither the government nor trial defense counsel re-examined SC.

Argument

The military judge violated A1C Mooty's Sixth Amendment right to confrontation by improperly admitting testimonial hearsay, after concluding that trial defense counsel "opened-the-door" to the evidence, contrary to *Hemphill v. New York,* 595 U.S. 140 (2022).

Standard of Review

This Court reviews a trial court's admission of evidence for an abuse of discretion. *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F.) (citing *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982)). An abuse of discretion occurs when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonable arising from the applicable facts and the law." *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). Whether admitted evidence violates the Confrontation Clause is reviewed de novo. *See, e.g.*, *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020); *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). Where an error constitutes a violation of the defendant's constitutional rights the Government must show that the error was harmless beyond a reasonable doubt. *See United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).

Law and Analysis

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (footnote omitted).

Although the Supreme Court did not articulate a bright-line test for what constitutes testimonial evidence, it explained:

> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; ***statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.***

Meléndez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (quoting *Crawford*, 541 U.S. at 51-52) (emphasis added in bold italics). Further, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Crawford*, 541 U.S. at 56 n.7.

Then, in 2022, the Supreme Court issued *Hemphill v. New York*, which addressed the question of whether a defendant can "open the door" to otherwise inadmissible testimonial hearsay statements. *Hemphill v. New York*, 595 U.S. 140 (2022). The Court concluded that the principle of "opening the door" was directly at odds with the Confrontation Clause, which "commands . . . that reliability be assessed

in a particular manner: by testing in the crucible of cross-examination." *Id.* at 152 (quoting *Crawford*, 531 U.S. at 61). Put simply, "[t]he Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court." *Id.* at 156.

The Supreme Court therefore held that the trial court erred by admitting unconfronted testimonial hearsay evidence against *Hemphill* over objection, "simply because the judge deemed [*Hemphill's*] presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." *Id.* at 153, 156. In other words, the Sixth Amendment "admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression." *Id.* at 154.

Here, the military judge's introduction of RH's statements constituted an abuse of discretion and resulted in material prejudice because 1) RH's statements were testimonial and she was not subject to cross-examination, 2) the military judge responded to the defense's questions by doing what *Hemphill* prohibits, and 3) the Government cannot prove this violation was harmless beyond a reasonable doubt.

1. RH's statement to A1C Mooty's First Sergeant via e-mail was testimonial and RH was not subject to cross-examination.

The circumstances under which the First Sergeant took RH's statement objectively show that the statement was produced for "use at a later trial" and therefore testimonial. *Crawford*, 541 U.S. at 52. This conclusion is obvious on the face of how RH framed her complaint and persisted throughout her exchange with the First Sergeant and undisputed by the government. Gov't Br. on Specified Issue at 15.

Indeed, RH's allegation, by design, is what initiated the investigation. R. at 20-21, 165. RH's subsequent statements to A1C Mooty's First Sergeant were in response to the First Sergeant's investigatory questions, which he asked knowing that the responses might result in disciplinary action. *Id.* at 37. In fact, RH's statements were made with the specific intent to expose A1C Mooty to discipline. App. Ex. II. at 19.

The readily discernible testimonial nature of RH's statements accords with the legal test for testimonial hearsay, which asks whether an objective witness would reasonably believe the statement would be available for use at a later trial. *Crawford*, 541 U.S. at 52. This Court looks objectively at the "totality of the circumstances" and considers three factors:

> (1) was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters?; and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?

United States v. Gardinier, 65 M.J. 60, 65 (C.A.A.F. 2007). "To rank as testimonial, a statement must have a primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (internal quotation marks and citations omitted).

Here, the military judge properly found RH's statements to be testimonial. App. Ex. XV at 7. In assessing the first *Rankin* factor, the military judge noted that the First Sergeant contacted RH based on direction from command to determine what happened with an eye toward discipline if the evidence warranted it. *Id.* at 6. This was further evidenced by the First Sergeant's question to RH regarding what she

wanted to happen as a result of her report. *Id.* at 6-7. Further, the prosecutorial inquiry was certainly made clear based on RH contacting A1C Mooty in an attempt to produce a confession after she had talked with the First Sergeant. *Id.* at 7. This factor certainly weighed in favor of RH's statements being testimonial.

The military judge continued, looking to the second *Rankin* factor, and found that RH's statements involved more than a routine objective cataloging of unambiguous factual matters because it involved RH's subjective impressions. *Id.* And finally, turning to the third *Rankin* factor, the military judge properly highlighted that the First Sergeant asked RH if she wanted the email exchange to be her "official communication," thereby demonstrating that this was a more formal exchange. *Id.* The First Sergeant then continued to ask RH specific questions, testing the basis and details of her allegation. It was evident from the exchange, and from the First Sergeant's testimony, that the purpose of the questioning was with an eye toward discipline.

Considering all three *Rankin* factors weighed in favor of RH's statements being testimonial, the military judge was correct in his finding that without the declarant present for cross-examination, the admission of RH's statements would be a gross violation of A1C Mooty's Sixth Amendment right to confrontation.

Because RH's statements to the First Sergeant were testimonial, her statements could not be admitted as evidence without her testimony unless two conditions were met—she was determined to be unavailable AND she was subject to prior cross-examination. U.S. CONST. amend. VI; *Crawford*, 541 U.S. at 59; *Blazier*, 69 M.J. at

222. Neither are present here. Even if an unavailability determination had been made, RH's out-of-court statements were never subject to cross-examination. Accordingly, RH's statements could not be admitted under this limited and narrow exception.

2. The military judge responded to the defense's questions by doing what *Hemphill* prohibits.

Having correctly arrived at the still-undisputed determination that RH's statements were testimonial, the military judge then abused his discretion through his erroneous application of *Hemphill*. Specifically, the military judge treated what could be considered the traditional notion of opening the door as an entryway to testimonial hearsay—a determination that *Hemphill* emphatically prohibits. And though the military judge couched his rationale using the language of waiver stating, "because [trial defense counsel] made the objection. They can waive that objection . . . ," the questioning by trial defense counsel was a far cry from the sort of intentional relinquishment contemplated by the two justices to comment on the issue in *Hemphill*. R. at 203; *Hemphill*, 595 U.S. at 156-59 (Alito, J. and Kavanaugh, J., concurring).

In both *Hemphill* and in the instant case, trial defense counsel highlighted a weakness in the government's proof. In *Hemphill*, defense counsel elicited testimony from a law enforcement officer that officers recovered 9-millimeter ammunition from the nightstand of a third-party, just hours after a 9-millimeter bullet killed the victim. *Hemphill*, 595 U.S. at 145. The third-party was not available to testify at trial, but he had previously entered a guilty plea to possessing a different caliber firearm. *Id*. Over objection, the trial judge permitted the prosecution to introduce the third-party's plea

allocution, on the basis that the defendant "opened the door" to this rebuttal evidence. *Id*.

Here, the military judge's view that trial defense counsel's question "arguably called for [the testimonial hearsay of RH]" is akin to the trial judge's view in *Hemphill* that defense counsel left a "misleading impression" for which unconfronted testimonial hearsay "might be reasonably necessary to correct." *Hemphill*, 595 U.S. at 154. In the instant case, the trial defense counsel highlighted a weakness in the government's proof—that the government had no evidence of A1C Mooty exhibiting specific signs of intoxication on the night in question. So, defense counsel asked SC whether or not he received any information or reports that, on the night in question, A1C Mooty was exhibiting *specific signs of intoxication*. R. at 203-04. The answer to those questions, was, "I did not." *Id*. at 202-03. "You received no information or report that Airman Mooty had bloodshot eyes, correct?" *Id*. at 202. SC's initial response was the factually correct, responsive answer to that question. There was nothing improper about SC consciously avoiding testimony that was previously deemed inadmissible. In fact, his caution to avoid statements that were properly excluded, was exactly what any criminal justice practitioner would expect of a competent witness. Accordingly, SC's answer, after being permitted to "clarify," was not a clarification at all. Instead, it was non-responsive, over conclusory, and not at all necessary to properly respond to defense's original question.

By allowing the government to "clarify," the military judge permitted the introduction of unconfronted testimonial hearsay to correct a misleading impression

left by SC's answers. This was improper rebuttal, and precisely the scenario prohibited by the Supreme Court's holding in *Hemphill*. *Hemphill*, 595 U.S. at 154.

To support the military judge's ruling that defense counsel had "opened the door" to RH's statement, or that A1C Mooty waived his right to confrontation, he quoted *United States v. Lopez-Medina*, 596 F. 3d 716 (10th. Cir. 2010) for the proposition that the Confrontation Clause cause is a shield and not a sword. *Lopez-Medina*, 596 F. 3d 716, 732. While that principle may remain true, the analysis should not have ended there, because *Lopez-Medina*, which is non-binding and precedes *Hemphill*, is easily distinguishable from the instant case.

The central distinction between *Lopez-Medina* and the instant case stems from the fact the defense counsel's questions in *Lopez-Medina* directly asked for the contents of the otherwise excluded testimonial statements. *Lopez-Medina*, 596 F. 3d at 731. As a result, the 10th Circuit Court of Appeals found that the defendant explicitly waived his right to confrontation, when the defense counsel – after being advised by the judge he could question a police officer about whether he received information from an informant, but not about the substance of that information – intentionally elicited from the officer the out-of-court statements of the informant. *Id*. at 732. Defense counsel proceeded to ask the officer if the informant told him about drugs in a pickup truck and gave him the defendant's address. *Id*. at 726.

Here, trial defense counsel did not attempt to introduce any statements made by RH. Rather, defense counsel was highlighting the *absence* of evidence surrounding *specific* signs of intoxication. In RH's emails to the First Sergeant, RH did not describe

why she concluded that A1C Mooty was drunk when he arrived at her residence on the night in question. *See* App. Ex. II at 12-21. She did not describe his speech, the color of his eyes, or an odor of alcohol. *See id.* To be sure, SC's answers to trial defense's questions evidenced as much. R. at 202-03. Instead, RH's statement was purely conclusory, and subjective. It was evident from both pre-trial motions, and the defense's objection to the admission of RH's statements through SC's testimony mid-trial, that trial defense counsel continuously asserted A1C Mooty's right to confront the witnesses against him. Put simply, trial defense counsel did not waive A1C Mooty's right to confrontation.

There is a presumption against the waiver of constitutional rights, and for a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. *Sweeney*, 70 M.J. at 303-04. In *Hemphill*, Justices Alito and Kavanaugh authored a concurring opinion, addressing the circumstances in which a defendant can be deemed to have validly waived the right to confront adverse witnesses. *Hemphill*, 595 U.S. at 156-59 (Alito, J. and Kavanaugh, J., concurring).

> Our precedents establish that a defendant can impliedly waive the Sixth Amendment right to confront adverse witnesses through conduct. The cause of implied waiver can be a "failure to object to the offending evidence" in accordance with the procedural standards fixed by state law. But implied waiver can also occur when a defendant engages in a course of conduct that is incompatible with a demand to confront adverse witnesses.

Id. at 157 (internal citations omitted).

Just as in *Hemphill*, "neither conduct evincing intent to relinquish the right of confrontation nor action inconsistent with the assertion of that right" is present here. Trial defense counsel continuously asserted A1C Mooty's right to confrontation and no action of defense counsel was inconsistent with that assertion.

> The introduction of evidence that is misleading as to the real facts **does not**, in itself, indicate a decision regarding whether any given declarant should be subjected to cross-examination. Nor is that kind of maneuver inconsistent with the assertion of the right to confront a declarant whose out-of-court statements could potentially set the record straight.

Id. at 158 (emphasis added).

As an example of circumstances in which a defendant's introduction of evidence may be regarded as an implicit wait of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause, the concurring justices discussed the rule of completeness. *Id.* "By introducing part of all of a statement made by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unconfronted witness." *Id.* As noted above, contrary to *Lopez-Medina*, trial defense counsel did not introduce, nor attempt to introduce, testimony of an unconfronted declarant, and the military judge's erroneous understanding and application of the law of waiver of a constitutional right constituted an abuse of discretion.

3. The Government cannot prove this violation was harmless beyond a reasonable doubt.

Because the error is constitutional in nature, the Government must show that the error was harmless beyond a reasonable doubt. *See Sweeney*, 70 M.J. at 304. The production of the inadmissible testimony warrants relief because the Government cannot meet this burden. Among the factors this Court must consider are "the importance of the unconfronted testimony in the prosecution's case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the prosecution's case." *Id.* at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). In doing so, it is not enough to find that other evidence that was admitted at trial might have been sufficient to uphold A1C Mooty's conviction. Instead, to affirm A1C Mooty's conviction, this Court must find that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)); *Sweeney*, 70 M.J. at 304.

This Court should find that there is, at the very least, a reasonable possibility that RH's out-of-court statements concerning A1C Mooty appearing drunk on the night in question contributed to A1C Mooty's conviction because the Government's case was otherwise fatally deficient. The government knew they needed RH's testimony to stand a chance at a lawful conviction but their zealous advocacy and desire for a conviction went too far. Even the Staff Judge Advocate for the 100th Air Refueling Wing at RAF Mildenhall noted the importance of RH's testimony in an email to try to secure RH's attendance by explaining:

> [RH], the witness whom we need summonsed, is expected to testify to her first-hand communications with and observations of A1C Mooty on the night in question. Without her testimony, the government will be unable to prove beyond a reasonable doubt that A1C Mooty was [driving under the influence] . . . [RH] is the sole reason this court-martial exists and was always a willing participant . . . .

App. Ex. III at 33.

It was RH's allegations that the entire investigation was based upon, and A1C Mooty was unable to properly test the reliability and veracity of the evidence against him via cross-examination, which is the only appropriate mechanism. *Hemphill*, 595 U.S. at 156. This resulted in a miscarriage of A1C Mooty's constitutional rights and severely undermined the fundamental fairness of the court-martial. RH's accusations were not cumulative – there was not a single witness who testified that A1C Mooty appeared drunk at any time that night or the morning thereafter, let alone while behind the wheel of a car. The evidence introduced at trial did little to corroborate RH's allegations – until RH's statement that she observed A1C Mooty drunk was smuggled through the purportedly opened door that *Hemphill* slams shut for such testimonial hearsay.

A military judge is presumed to know the law and apply it correctly, absent clear evidence to the contrary. *United States v. Leipart*, 85 M.J. 35, 40 (C.A.A.F. 2024) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2024). Here, that presumption is overcome because there exists clear evidence to the contrary. After explaining his erroneous view of the law in his mid-trial ruling, after admitting the testimonial statement of RH through SC, the military judge explicitly stated, "So I'm going to allow

that answer and I will consider that answer." R. at 212. Thus, the government cannot prove that the error was harmless beyond a reasonable doubt.

Assuming *arguendo*, that trial defense counsel's question about bloodshot eyes left a misleading impression on the military judge, there was a simple fix which would have alleviated his concern that the Confrontation Clause was being used "as a sword." The Supreme Court in *Hemphill* explained that its broad holding did not leave prosecutors without recourse to protect against abuses of the right to confrontation, which includes moving to strike the offending testimony. *Hemphill*, 595 at 155. The Court noted that "well established rules" generally preclude introduction of hearsay statements, and allow judges to exclude otherwise admissible evidence "if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)). Moreover, courts retain the power to withdraw or strike evidence already admitted, or to issue a curative instruction, when the prejudicial or misleading nature of the evidence becomes apparent only after admission. *Id.* Had the military judge simply struck trial defense counsel's questions and SC's responses, he could have alleviated that concern, and likely without violating A1C Mooty's constitutional rights. Instead, he took a different route by explicitly stating that he would consider RH's statement, the admission of which directly violated A1C Mooty's Sixth Amendment right to confrontation. Therefore, there is, at the very least, a reasonable possibility that this evidence contributed to the findings in this case.

WHEREFORE, A1C Mooty respectfully requests this Honorable Court set aside the finding of guilty and sentence and dismiss the Specification and Charge with prejudice.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 May 2025.

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