IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE 66(b)(1)(A)**
	)	
v.	)	
	)	
Senior Airman (E-4)	)	No. ACM 40298
TERRY L. PITTMAN,	)	
United States Air Force	)	3 October 2022
Appellant	)	

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

On 18-19 April 2022, contrary to his pleas, Senior Airman (SrA) Terry L. Pittman, 819th Red Horse Squadron (ACC), Malmstrom Air Force Base, Montana, was convicted of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge and one specification of making a false official statement in violation of Article 107, UCMJ, and one charge and one specification of communicating a threat in violation of Article 115, UCMJ. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] On 13 July 2022, the Government sent SrA Pittman the required notice of his right to appeal, within 90 days, because his court-martial sentence included confinement for more than six months but less than two years and no dismissal, dishonorable discharge, or bad conduct discharge. Pursuant to Article 66(b)(1)(A), SrA Pittman files his notice of direct appeal with this Court.

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id*.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 October 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40298**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Terry L. PITTMAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

A direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was filed in the above styled case with this court on 3 October 2022.

Accordingly, it is by the court on this 5th day of October, 2022,

ORDERED:

The case has been referred to Panel 1 for review.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 22 November 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **2 February 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

GRANTED
23 NOVEMBER 2022

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 November 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

23 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 November 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 26 January 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 March 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of UCMJ, and one charge and one specification of communicating a threat in violation 15, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

GRANTED
27 JAN 2023

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id.*

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 26 January 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 27 February 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 April 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 145 days have elapsed. On the date requested, 180 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of , UCMJ, and one charge and one specification of communicating a threat in violation 15, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

GRANTED
27 FEB 2023

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id.*

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 February 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 February 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 27 March 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 May 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of Article 107, UCMJ, and one charge and one specification of communicating a threat in violation of Article 115, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

GRANTED
28 MAR 2023

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id.*

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 22 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's seventh priority case. The following cases have priority over the present case:

1. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has reviewed Appellant's ROT and has consulted with Appellant on issues to raise.

2. *United States v. Arbo*, ACM 40285 – The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits. Counsel has reviewed Appellant's ROT and is consulting with Appellant on issues to raise.

3. *United States v. Goldman*, ACM 39939 (f rev) – The record of trial is 12 volumes; the trial transcript is 924 pages. There are 5 prosecution exhibits, 1 defense exhibit, and 48 appellate exhibits. Counsel has not yet completed her review of Appellant's post-trial paperwork.

4. *United States v. Blackburn*, ACM 40303 – The record of trial is 6 volumes; the trial transcript is 519 pages. There are 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits. Counsel has begun reviewing Appellant's ROT.

[2] Since the filing of Appellant's last EOT, counsel filed a petition for reconsideration to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Daniels III*, ACM 39407 (rem) on 10 March 2023 and filed a brief in *United States v. Flores*, ACM S32728 on 21 March 2023.

5. *United States v. Irvin*, ACM 40311 - The record of trial is 2 volumes; the trial transcript is 81 pages. There are 4 prosecution exhibits, 11 defense exhibits, and 14 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

6. *United States v. Graves*, ACM 40340 - The record of trial is 5 volumes; the trial transcript is 122 pages. There are 3 prosecution exhibits, 1 defense exhibits, and 5 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 March 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 March 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME OUT OF TIME (FIFTH)**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 40298
TERRY L. PITTMAN,	)	
United States Air Force	)	28 April 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3), (m)(6) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time out of time (OOT) to file an Assignments of Error (AOE). Good cause exists to grant Appellant's EOT, which is being filed two days out of time, due to counsel mistakenly believing the EOT was due on 28 April, not 26 April. Appellant requests an enlargement for a period of 30 days, which will end on **2 June 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 205 days have elapsed. On the date requested, 240 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of Article 107, UCMJ, and one charge and one specification of communicating a threat in violation of Article 115, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 23 cases; 11 cases are pending initial AOEs before this Court. This is military counsel's sixth priority case. The following cases have priority over the present case:

1. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has reviewed Appellant's ROT, has consulted with Appellant on issues to raise, is researching the issues, and is drafting Appellant's Assignments of Error to submit to this Court by 7 May 2023.

2. *United States v. Blackburn*, ACM 40303 – The record of trial is 6 volumes; the trial transcript is 519 pages. There are 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits. Counsel has begun reviewing Appellant's ROT and has reviewed half of the sealed materials in his case.

3. *United States v. Knodel*, ACM 40018 - Counsel received the *DuBay* transcript for proofing on 24 April 2023. The *DuBay* transcript is 1473 pages. Counsel has reviewed

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Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id*.

[2] Since the filing of Appellant's last EOT, counsel filed a reply brief in *United States v. Jones*, ACM 40226, on 18 April 2023, filed a Supplement to Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Kitchen*, ACM 40155, on 20 April 2023, and filed a reply brief in *United States v. Flores*, ACM S32728, on 27 April 2023.

approximately 100 pages of the transcript and will continue her review once she files Appellant's brief in *United States v. Robles*.

4. *United States v. Irvin*, ACM 40311 - The record of trial is 2 volumes; the trial transcript is 81 pages. There are 4 prosecution exhibits, 11 defense exhibits, and 14 appellate exhibits. Counsel has begun reviewing Appellant's ROT and submitted a motion to view sealed materials.

5. *United States v. Graves*, ACM 40340 - The record of trial is 5 volumes; the trial transcript is 122 pages. There are 3 prosecution exhibits, 1 defense exhibits, and 5 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and

served on the Appellate Government Division on 28 April 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

1 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40298**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Terry L. PITTMAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 28 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), Out of Time, 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 2d day of May, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth), out of time, is **GRANTED**. Appellant's brief will be due **2 June 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 25 May 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 July 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of UCMJ, and one charge and one specification of communicating a threat in violation 15, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

GRANTED
1 JUN 2023

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id.*

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 22 cases; 9 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case. The following cases have priority over the present case:

1. *United States v. Blackburn*, ACM 40303 – The record of trial is 6 volumes; the trial transcript is 519 pages. There are 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits. Counsel has completed her review of Appellant's ROT, has consulted with Appellant concerning issues to raise, and has begun drafting Appellant's Assignments of Error.

2. *United States v. Knodel*, ACM 40018 - Counsel received the *DuBay* transcript for proofing on 24 April 2023. The *DuBay* transcript is 1473 pages. Counsel has reviewed approximately 350 pages of his *DuBay* transcript.

3. *United States v. Graves*, ACM 40340 - The record of trial is 5 volumes; the trial transcript is 122 pages. There are 3 prosecution exhibits, 1 defense exhibits, and 5 appellate exhibits. Counsel has begun reviewing Appellant's ROT and has reviewed the sealed materials in his case.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

[2] Since the filing of Appellant's last EOT, counsel filed a brief in *United States v. Robles*, ACM 40280, on 8 May 2023, and filed a Supplement to Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Hernandez*, ACM 39606 (rem) on 17 May 2023.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 May 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

31 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 May 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 21 June 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 August 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 259 days have elapsed. On the date requested, 300 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of UCMJ, and one charge and one specification of communicating a threat in violation 15, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

GRANTED
23 JUN 2023

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel has begun reviewing counsel's ROT. Counsel is currently assigned 21 cases; 8 cases are pending initial AOEs before this Court. This is military counsel's third priority case. The following cases have priority over the present case:

1. *United States v. Blackburn*, ACM 40303 – The record of trial is 6 volumes; the trial transcript is 519 pages. There are 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits. Counsel has completed her review of Appellant's ROT, has consulted with Appellant concerning issues to raise, and is drafting Appellant's Assignments of Error to submit on 28 June 2023.

2. *United States v. Knodel*, ACM 40018 - Counsel received the *DuBay* transcript for proofing on 24 April 2023. The *DuBay* transcript is 1473 pages. Counsel has reviewed approximately 925 pages of his *DuBay* transcript.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

---

specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id*.

[2] Since the filing of Appellant's last EOT, counsel was off for the Memorial Day holiday and for associated leave from 26 May-2 June 2023. Counsel was also off for the Juneteenth holiday from 16-19 June 2023.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 June 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

22 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 June 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (EIGHTH)**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 40298
TERRY L. PITTMAN,	)	
United States Air Force	)	25 July 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 August 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one specification of making a false official statement in violation of Article 107, UCMJ, and one charge and one specification of communicating a threat in violation of Article 115, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits; the trial transcript is 341 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 24 cases; 10 cases are pending initial AOEs before this Court. This is counsel's first priority case, and due to her upcoming permanent change of station, the case has been assigned to a reservist, Col Anthony Ortiz. It is also Col Ortiz's first priority case.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id*.

[2] Since the filing of Appellant's last EOT, counsel filed a lengthy brief in *United States v. Blackburn*, ACM 40303, on 28 June 2023, a reply brief in *United States v. Robles*, ACM 40280, on 29 June 2023, completed her review of the 1473-page *DuBay* transcript in *United States v. Knodel*, ACM 40018, on 7 July 2023, and co-wrote a Supreme Court petition in *United States v. King*, ACM 39583 for submission by 23 July 2023. Since the last EOT, counsel was also off for the 4th of July holiday, and on leave from 14-21 July 2023.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 July 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant will have consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. In addition, it appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 July 2022.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40298**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Terry L. PITTMAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 25 July 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 28th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **31 August 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN,** United States Air Force *Appellant*	)	No. ACM 40298 24 August 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 8 days, which will end on **8 September 2023**. The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 338 days will have elapsed.

On 18-19 April 2022, contrary to his pleas, Appellant was convicted by a miliary judge, sitting as a general court-martial, at Malmstrom Air Force Base, Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge, one charge and one s f making a false official statement in violation of Article 107, UCMJ, a e and one specification of communicating a threat in violation of Article

GRANTED
30 Aug 2023

115, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

The case is presently Col Ortiz's first priority in terms of records requiring review before this Court. Undersigned counsel is currently assigned 3 cases; 2 cases pending initial AOE before this Court. Col Ortiz has reviewed the record, identified several issues in his review, and has drafted a majority of the brief. However, he requires additional time to complete the assignment of errors and coordinate with Appellant. Further, because Col Ortiz is reservist and not currently on orders, he will need to coordinate his work in this case around his civilian work responsibilities as a trial attorney at the Department of Justice. Major Jenna M. Arroyo was Appellant's previously assigned counsel and has received a permanent change of station. Major Arroyo will submit a motion to withdraw from the case shortly.[2]

Through no fault of Appellant, an enlargement of time is necessary to allow Appellant's counsel to fully review Appellant's case, advise Appellant regarding potential errors, and submit an Assignment of Errors brief on Appellant's behalf.

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

---

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id*.

[2] Accordingly, Major Arroyo's signature block will not be included in this motion.

Respectfully submitted,

[redacted]
ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 24 August 2023.

[redacted]
ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

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

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

Also, this request appears to fail to comply with this Court's 2 May 2023 order that "any subsequent motions for enlargement of time shall . . . include a statement as to . . . whether Appellant agrees with the request for an enlargement of time."

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 August 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION TO AMEND PLEADING**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN,** United States Air Force *Appellant*	)	No. ACM 40298 29 August 2023

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

Pursuant to Rule 23.3(n) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to Amend Appellant's Motion for Enlargement of Time (Ninth), submitted to this Court on 24 August 2023.

Due to an inadvertent error, undersigned counsel failed to include whether Appellant agreed with the request for an enlargement of time. As such, Appellant moves to amend the last full paragraph prior to the prayer for relief on page 2 of Appellant's motion to add the following: "Appellant agrees with this request for an enlargement of time." A proposed corrected copy of Page 2 is attached.

Undersigned counsel apologizes for this inadvertent error and recognizes that this Court may view the 24 August 2023 motion as out of time. In that event, good cause exists to grant this motion in light of undersigned counsel being recently as s case and due to the permanent change of station of Appellant's pr

GRANTED
30 AUG 2023

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the Motion to Amend Pleading.

Respectfully submitted,

[redacted]
ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 August 2023.

[redacted]
ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

ATTACHMENT

115, UCMJ. R. at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[1] R. at 341.

The case is presently Col Ortiz's first priority in terms of records requiring review before this Court. Undersigned counsel is currently assigned 3 cases; 2 cases pending initial AOE before this Court. Col Ortiz has reviewed the record, identified several issues in his review, and has drafted a majority of the brief. However, he requires additional time to complete the assignment of errors and coordinate with Appellant. Further, because Col Ortiz is reservist and not currently on orders, he will need to coordinate his work in this case around his civilian work responsibilities as a trial attorney at the Department of Justice. Major Jenna M. Arroyo was Appellant's previously assigned counsel and has received a permanent change of station. Major Arroyo will submit a motion to withdraw from the case shortly.[2]

Through no fault of Appellant, an enlargement of time is necessary to allow Appellant's counsel to fully review Appellant's case, advise Appellant regarding potential errors, and submit an Assignment of Errors brief on Appellant's behalf. Appellant agrees with this request for an enlargement of time.

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

---

[1] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id.*

[2] Accordingly, Major Arroyo's signature block will not be included in this motion.

8 Sep 2023

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

TERRY L. PITTMAN III
Senior Airman, USAF
Appellant

Before Panel No. 1

No. ACM 40298

BRIEF ON BEHALF OF APPELLANT

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Senior Airman (E-4) **TERRY L. PITTMAN III**, United States Air Force, *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM 40298 Filed on: 8 September 2023

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

Assignments of Error

I.

WHETHER ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, IS UNCONSTITUTIONALLY VAGUE WHEN IT FAILS TO SPECIFY THE MENS REA LEVEL FOR ESTABLISHING WRONGFULNESS IN LIGHT OF *COUNTERMAN V. COLORADO*, 143 S. CT. 2106 (2023), AND WHERE THE *MANUAL FOR COURTS-MARTIAL* AND MILITARY CASE LAW FAILS TO ESTABLISH THE MENS REA LEVEL NECESSARY TO ESTABLISH WRONGFULNESS.

II.

ASSUMING ARGUENDO THAT ARTICLE 115 IS NOT UNCONSTITUTIONALLY VAGUE, WHETHER THE GOVERNMENT FAILED TO STATE AN OFFENSE UNDER ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, WHEN IT FAILED TO ALLEGE THE REQUISITE MENS REA TO ALLOW SRA PITTMAN TO PREPARE HIS DEFENSE.

III.

WHETHER SRA PITTMAN'S CONVICTION FOR WRONGFUL COMMUNICATION OF A THREAT IN VIOLATION OF ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, IS LEGALLY AND FACTUALLY SUFFICIENT.

IV.

WHETHER THE 326-DAY PERIOD FROM PREFERAL OF THE CHARGES TO ARRAIGNMENT VIOLATED SRA PITTMAN'S RIGHT TO SPEEDY TRIAL UNDER RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT.

Statement of the Case

On 18-19 April 2022, contrary to his pleas, Appellant, Senior Airman (SrA) Terry L. Pittman III, was convicted by military judge, sitting as a general court-martial, at Malmstrom Air Force Base (AFB), Montana, of one charge and two specifications of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ), one charge and one specification of making a false official statement in violation of Article 107, UCMJ, and one charge and one specification of communicating a threat in violation of Article 115, UCMJ.[1] Record (R.) at 279. The military judge sentenced SrA Pittman to be reprimanded, to be reduced to the grade of E-1, and to be confined for 8 months.[2] R. at 341.

---

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

[2] SrA Pittman was sentenced to be confined for 8 months (Specification 1 of Charge I), 2 months (Specification 2 of Charge I), no confinement (the Specification of Charge III), and 8 months (the Specification of Charge IV), with all terms of confinement to be served concurrently. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated

Statement of Facts

All of the charges in this case stem from of an allegation that the victim in this case, SrA TLP, sexually assaulted SrA Pittman's then-fiancée and now-current wife. This unfortunate allegation culminated in a series of events that led to an altercation between SrA Pittman and SrA TLP in a parking lot on Malmstrom AFB where SrA Pittman allegedly assaulted SrA TLP by striking him in the head with the butt of an unloaded gun. R. at 110, 163.

Among other things, the Government charged SrA Pittman with wrongfully communicating a threat to SrA TLP during this altercation in violation of Article 115 as follows: "[d]id . . . wrongfully communicate to [SrA TLP] a threat to shoot him with a firearm." Charge Sheet, Vol. 1, ROT. The Government's theory of the case was that SrA Pittman confronted SrA TLP about the rape allegation, pulled out a gun, "charged"[3] the weapon, and threatened to shoot SrA TLP with the still-unloaded firearm. R. at 110, 164, 268.

But the only witnesses other than SrA TLP at the scene could not recall what, if anything, was said between SrA Pittman and SrA TLP. That night, two airmen accompanied SrA Pittman—Airman First Class (A1C) RL and A1C DW—and witnessed the altercation but did not recall SrA Pittman threatening to shoot SrA

9 May 2022. One charge and one specification of obstruction of justice in violation of Article 131b, UCMJ, was withdrawn and dismissed without prejudice. *Id*.

[3] Witnesses describe this as "cock[ing]" or pulling the slide of the weapon back to place a bullet in the chamber. *See, e.g*., R. at 185-86, 207. But the Government conceded the weapon was unloaded. *See* R. at 10.

TLP. *See* R. at 175, 195.[4] And the purported victim, SrA TLP, alternated on the stand between two different version of events.

In SrA TLP's first version, SrA Pittman only responded to a question SrA TLP posed: "I thought I asked him if he was going to shoot me, first off, to confirm he was going to kill me. And he said, 'Yes,' so I was like – I guess it was – I originally thought that this was like a terrible place, but I was like, 'Okay.'" R. at 208. According to SrA TLP, he told SrA Pittman to shoot him, who told SrA TLP to get on his knees and beg for mercy and then hit SrA TLP with the gun when he refused. *Id*.

But in SrA TLP's second version, SrA TLP's communication appears to be one-sided and appears that SrA Pittman did not respond at all:

Q. And then you saw him pull a gun out?

A. Yes.

Q. And when you saw that, you laughed at Airman Pittman, right?

A. Yes.

Q. You weren't afraid of him, were you?

A. No.

Q. In fact, you told him to shoot you?

A. Yes, sir.

Q. And after you told him to shoot you is when he hit you?

A. Yes, sir.

[4] A1C RL testified that he could not remember SrA Pittman threatening to kill SrA TLP, R. at 175, and A1C DW stated that there was some kind of dialogue between them, but he could not remember that was said. R. at 195.

R. at 213-214. In this version, SrA TLP did not claim that SrA Pittman ever responded to his statement to "shoot him." *See id.*

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

Arguments

I.

ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, IS UNCONSTITUTIONALLY VAGUE WHEN IT FAILS TO SPECIFY THE LEVEL OF MENS REA REQUIRED FOR ESTABLISHING WRONGFULNESS IN LIGHT OF *COUNTERMAN V. COLORADO*, 143 S. CT. 2106 (2023) AND WHERE THE *MANUAL FOR COURTS-MARTIAL* AND MILITARY CASE LAW DO NOT ESTABLISH THE LEVEL OF MENS REA REQUIRED FOR ESTABLISHING WRONGFULNESS.

Standard of Review

The constitutionality of a statute is a question of law, and so the standard of review is de novo. *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000).

Law and Analysis

A. Void-for-Vagueness

Under the Fifth Amendment "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *United States v. Pope*, 63 M.J. 68, 76 (C.A.A.F. 2006) (Erdmann, J., dissenting).

"Generally, the void-for-vagueness doctrine 'requires that the penal statute define the criminal offense with sufficient definiteness that ordinary people can

understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). "It is settled that, as a matter of due process, a criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' is void for vagueness." *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (internal citations omitted). The Supreme Court found this statement true "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Id.* The Supreme Court, however, has recognized "that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)).

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams,* 553 U.S. 285, 304 (2008). The vagueness of a statute is determined based on particular facts at issue and "when a statute 'interferes with the right of free speech...a more stringent vagueness test should apply.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 55 U.S. 489, 499 (1982)).

B. Article 115, UCMJ

SrA Pittman was found guilty of wrongful communication of a threat under Article 115, UCMJ. But the statutory language for Article 115 does not provide a requirement for mens rea and only criminalizes "wrongfully communicat[ing] a threat to injure the person, property, or reputation of another…." 10 U.S.C. § 915(a).[5] And the elements set forth in the *Manual for Courts-Martial* do not explicitly incorporate a specific mens rea requirement for the offense:

> (a) That the accused communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future;
>
> (b) That the communication was made known to that person or to a third person; and
>
> (c) That the communication was wrongful.

MCM, Part IV, ¶ 53.b.(1)(a)-(c).

The President's explanatory paragraphs in Part IV of the *MCM* do address the intent requirement for the third element of Article 115 "[t]hat the communication was wrongful" and instructs that the Government must prove an accused's subjective intent in making a communication. *Id.*¶ 53.c.(2).[6] This subjective intent takes two

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[5] The lack of a mens rea requirement does not per se invalidate a criminal statute. In *Elonis v. United States*, 575 U.S. 723 (2015), the Supreme Court found that a federal criminal statute for communication of a threat under interstate commerce, 18 U.S.C.S. § 875(c), did not articulate a particular mental state requirement in its text but imputed a "knowing" mental state requirement.

[6] But the courts are not bound by the President's interpretation of the elements in Part IV of the *MCM*. *See, e.g.*, *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017); *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998).

forms: "transmit[ting] the communication for *the purpose of issuing a threat* or *with knowledge that the communication* will be viewed as a threat." *Id*. (emphasis added). The *MCM* provides no further explanation of subjective intent and does not further define either "for the purpose" or "with knowledge." *See id*.

Subjective intent to establish wrongfulness of a threat has been an elusive concept in military law, especially when balancing against the First Amendment. Indeed, despite clear authority that the Government must prove the *existence* of an accused's subjective intent in order to establish the wrongfulness element, no source of military law, including the statute, the *MCM*, or case law, establishes the *level* of mens rea that the Government must prove wrongfulness under Article 115.

The level of mens rea is essential in cases involving the criminalization of speech, when weighing First Amendment rights against the limitations of speech in the military community. *See United States v. Wilcox*, 66 M.J. 442, 447-50 (C.A.A.F. 2008) (describing special analysis when reviewing "threats" that potentially implicated protected speech); *see also generally United States v. Priest,* 21 U.S.C.M.A 564, 569-70 (C.M.A. 1972) (explaining the balance between needs of the armed services and the right to speak as a free American). And while threats of violence fall outside the bounds of the First Amendment's protection, the accused's mental state must be closely examined in criminal prosecutions for speech to prevent a chilling effect on speech. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958) (finding the government bears the burden of persuasion to show criminal speech in light of the "transcendent value of speech"); *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004) (noting the

"extraordinary harm and a serious chill upon protected speech" in reversing an injunction on the Government from enforcing a criminal statute that likely violated the First Amendment).

Although the dots of subjective mens rea are on the board, determining what level of evidence is necessary to connect these dots into the picture of "wrongful" communication of a threat is not evident in the case law. While *Elonis* allows reading the presence of mens rea necessary to criminalize speech when a statute is silent, the Supreme Court does not provide how a charging authority or reviewing court chooses between differing levels of subjective mens rea to establish criminal intent. *See Elonis*, 575 U.S. at 736-37. Likewise, military case law does not specifically address what level of mens rea required under the offense, but merely establishes that some sort of wrongful subjective intent be present.[7] *See, e.g.*, *United States v. Rapert*, 75 M.J. 164, 168 (C.A.A.F. 2016) ("communicating a threat under the UCMJ does not predicate criminal liability on mere negligence alone, but instead requires the Government to also prove a subjective element, i.e., the accused's mens rea."); *United States v. Dixon*, ACM 39878 (f rev), 2022 CCA LEXIS 333 (A.F. Ct. Crim. App. 6 Jun 2022) (noting that wrongfulness could be established by "acting recklessly" under the 2016 *MCM*)).

[7] Communication of a threat was previously an Article 134 offense, but Congress moved the offense to its current position and eliminated the terminal element requirement pursuant to section 5427 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

C. Recent Supreme Court developments

Recently, the Supreme Court filled the gaps in the subjective mens rea requirements for criminal prosecution of speech under federal law. In *Counterman v. Colorado*, the Court addressed whether the First Amendment required proof of a defendant's subjective mindset in "true-threat"[8] cases and, if so, what level of mens rea is sufficient. 143 S.Ct. 2106, 2111-12 (2023). In interpreting Colorado's statute that criminalized "making any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress,"[9] the Court adopted a subjective mental-state element where the State must prove that the defendant had some understanding of the statements' threatening character. *Id.* at 2113.

But unlike military case law, the Court's analysis did not stop simply at the need for a subjective element pertaining to an accused's mindset to consummate an offense. It further analyzed what level of mens rea was required to establish the subjective element for the offense. *See id.* at 2117. The Court found that the criminalizing speech offers three basic choices for mens rea: 1) purposeful "the most culpable level . . . and hardest to prove"—is when a person consciously desires that the words would be received as threats; 2) knowing, when a person is aware that a result is practically to follow and knows that practical certainly that others will take

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[8] "'True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Counterman,* 143 S.Ct at 2112 (quoting *Virginia* v. *Black*, 538 U.S. 343, 359 (2003)).

[9] COLO. REV. STAT. §18-3-602(1)(c) (2022).

his words as threats; and 3) reckless, when the declarant consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. *Id.* (internal citations and quotation marks omitted).

D. Application of *Counterman* to Article 115, UCMJ

Counterman demonstrates the apparent gap in the military justice system in defining the subjective element requirement for communication of a threat. *Counterman* makes it clear that one of the three levels of mens rea must be adopted to establish subjective intent. But the statutory component for Article 115 does not contain a subjective requirement, and the *MCM* muddies the waters by appearing to adopt two differing levels of mens rea for establishing the same element of wrongfulness in the President's non-binding analysis of the elements: 1) a purposeful standard ("for the purpose of issuing a threat") and 2) a knowing standard ("with knowledge that the communication be viewed as a threat").[10] Although a criminal statute can require different mental states from "different elements of the same offense," at least one Federal circuit has refused to adopt a differing mens rea requirements to establish the same element for an offense. *See United States v. Reyna*, 130 F.3d 104, 109 (5th Cir. 1997) (we refuse to interpret [26 U.S.C. §] 5861(d)

[10] To add more confusion to the question of mens rea, the 2016 *MCM* adopted a reckless standard for the prior offense of communicating a threat under Article 134, which has been omitted in the 2019 *MCM*. *See* 2016 *MCM*, Pt. IV, ¶ 110.c ("For purposes of this paragraph, to establish that the communication was wrongful it is necessary that the accused transmitted the communication for the purpose of issuing a threat, with the knowledge that the communication would be viewed as a threat or acted recklessly with regard to whether the communication would be viewed as a threat."), *compare with* 2019 *MCM*, pt. IV, ¶ 53(c)(2).

to have different mens rea requirements for the same element…"). And even if permissible under military law, an accused still has the right to know which standard he or she must defend against. *See* Argument II, *infra.*

Article 115 lacks any of the requisite clarity needed to discern the subjective mens rea that is patently missing from its text. And *Counterman* makes it clear that this determination must not stop simply at the presence of some undefined form of subjective intent, but also the specific level of intent needed for the Government to prove. *See Counterman*, 143 S.Ct. at 2117. Because there is no clear guidance on this missing piece of the puzzle, Article 115 is unconstitutionally vague on its face. The Government cannot establish that any source of military law provides a military member of ordinary intelligence fair notice the level of mens rea that he or she must defend against. *Colautti*, 439 U.S. at 390. Rather, military law encourages discriminatory enforcement by providing multiple standards for proving subjective intent while lacking any guidance on their application. Accordingly, because no level of mens rea is specified or even discernible in military law, Article 115 is void on its face.

WHEREFORE, Appellant respectfully requests that the Court find that Article 115 is unconstitutional and is void-for-vagueness under the Due Process Clause of the Fifth Amendment.

II.

ALTERNATIVELY, CHARGE IV AND ITS SPECIFICATION FAIL TO STATE AN OFFENSE UNDER ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, WHEN THE GOVERNMENT FAILED TO ALLEGE THE REQUISITE MENS REA TO ALLOW SRA PITTMAN TO PREPARE HIS DEFENSE.

Standard of Review

The question of whether a specification fails to state an offense is a question of law that is reviewed de novo, but when a failure to state an offense is first raised after trial, the accused must make a clear showing of substantial prejudice. *United States v. Turner*, 79 M.J. 401, 404, 406 (C.A.A.F. 2020).

Law and Analysis

Assuming *arguendo* that Article 115, UCMJ, is not unconstitutionally vague, the Government has still failed to establish that Charge IV and its specification sufficiently alleged the element of wrongfulness. As discussed above, *Counterman* makes it clear that the Government can proceed under one of three theories: purposeful, knowing, or reckless. *Counterman,* 143 S.Ct at 2117. But the Government did not allege any level of mens rea in the specification. Accordingly, Charge IV and its specification fails to state an offense.

The Rules for Courts-Martial provide standards for alleging an offense under the UCMJ. *See* R.C.M. 307(c). A "specification is sufficient if it alleges every element of the offense charged expressly or by necessary implication" so as to provide an accused both notice and protection against double jeopardy. R.C.M. 307(c); *see also United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). And here, the specification

does not afford SrA Pittman sufficient notice of the level of wrongfulness that he must defend against.

If a motion to dismiss a specification for failure to state an offense is not raised at trial, it does not preclude an appellant from raising the issue on appeal but does dictate which analytical standard the reviewing court applies when evaluating the sufficiency of the specification. *Turner,* 79 M.J. at 403-04. In *Turner*, CAAF explained that courts apply a more narrow standard to reading a specification and "adopt interpretations that hew closely to the plain text'" if a specification is challenged at trial. *Id*. at 403 (quoting *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011)). "Hewing closely to the plain text means [the court] will consider only the language contained in the specification when deciding whether it properly states the offense in question. *Id.* (citing *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010)). But CAAF has found that a flawed specification first challenged after trial is viewed with "greater tolerance" and will be viewed with "maximum liberality." *Id*. Under either standard, if the specification fails to state an offense, the specification must be dismissed unless the Government can demonstrate the constitutional error was harmless beyond a reasonable doubt. *Id*. at 403-04.

Although the challenge here is being raised for the first time on appeal, this Court should narrowly construe the text to hew closely to the plain text of the specification, consistent with challenges raised at trial. The Supreme Court's decision is *Counterma*n was decided after SrA Pittman's court-martial and new developments in the First Amendment jurisprudence, especially in light of the gaps

in military law noted above, should not require an accused to bring such a challenge at trial. *See generally United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008) (Ryan, J. concurring) (an appellant is entitled to avail himself of a new rule even if no error at the time); *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017) ("[W]hen there is a new rule of law, when the law was previously unsettled, and when the [trial court] reached a decision contrary to a subsequent rule...it is enough that an error be plain at the time of appellate consideration." (alterations in original) (internal quotation marks omitted) (quoting *Henderson v. United States*, 568 U.S. 266) (2013)).

But even if viewed with "maximum liberality," the specification does not allege the level of wrongfulness either directly or by implication. Indeed, the Government only charged SrA Pittman with "wrongfully communicat[ing]" a threat to SrA TLP, omitting any further allegation that the communication was "knowing," "purposeful," or "reckless." *See* Charge Sheet, Vol. 1. And as analyzed below, the specification does not indicate under what theory the Government was attempting to prove. *See* Argument III, *infr*a. Accordingly, because the specification does not allege any level of mens rea nor is there any notice of the mens rea level requirement for the offense, the specification fails to state an offense. *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) ("The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." (internal quotation marks, citation, and alteration omitted)).

The prejudice in this case is clear—SrA Pittman did not receive notice of the required level of mens rea he needed to defend against and there was no indication at trial of the Government's theory of the offense. Under the current military case law, SrA Pittman "must show that under the totality of the circumstances in this case, the Government's error... resulted in material prejudice to [his] substantial, constitutional right to notice." *Oliver*, 76 M.J.at 275 (C.A.A.F. 2017) (quoting *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012) (internal quotation omitted)). In *Humphries*, CAAF found that the appellant was prejudiced by the Government's failure to include the terminal element for an Article 134 offense after examining the record to see whether notice of the element was somewhere in the trial record or whether the element was essentially uncontroverted. 71 M.J. at 215-16. In that case, the missing terminal element was not mentioned in the Government's opening statement, none of the witness testimony related to the terminal element of the charge, and trial counsel did not analyze the missing terminal element in the Government's closing argument. *Id.* at 216.

Like *Humphries*, nothing in the record demonstrates that SrA Pittman was afforded notice of what theory he needed to defend against. For example, the Government's opening statement only vaguely alluded to the threat SrA Pittman allegedly made and trial counsel did not comment on the level of mens rea that was required. *See* R. at 164. Nor is it apparent through SrA TLP's testimony under what theory the Government was attempting to establish SrA Pittman's subjective intent *See* Issue III, *infra*. The Government did not attempt to tie SrA TLP's testimony to

a particular level of mens rea in its closing argument and did not indicate what the actual threat was. *See* R. at 266 ("He already has charged his firearm when he's threatening to shoot [SrA TLP] and they are having this conversation."); R. at 269 ("It was not in situation which it would be considered a joke. The accused had a weapon out at the time, he had a gun. It is clear what his intent was when making that communication."). Finally, because this was a judge-alone case, there were no instruction to clarify under what legal basis SrA Pittman was convicted. Because Charge IV and its specification fails to state an offense, the charge and its specification should be dismissed.

WHEREFORE, SrA Pittman requests that this Court set aside Charge IV and its Specification.

III.

SRA PITTMAN'S CONVICTION FOR WRONGFUL COMMUNICATION OF A THREAT IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

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

Law

This Court may only affirm findings it determines are "correct in law and fact[.]" Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019).[11] The test for legal sufficiency

[11] The Government charged all offense as occurring in December 2020, therefore, the changes to this Court's factual sufficiency review brought by the National Defense

of the evidence "is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Factual sufficiency requires this Court to determine whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [the Court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (emphasis omitted). A review for factual sufficiency "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

This Court's "unique power of review for factual sufficiency, however, is subject to a critical limitation. A Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *Walters*, 58 M.J. at 395 (citing *United States v. Smith*, 39 M.J. 448, 451 (C.M.A. 1994)). "In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, our unique factfinding authority is a vital safeguard designed to ensure that every conviction is

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Authorization Act of 2021 do not apply. *See* Article 66(d)(1), 10 U.S.C. § 866(d)(1)(B) (2021).

supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016) (unpub. op.). This authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). Finally, this Court has the tremendous power to judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the fact finder. *United States v. Col*e, 31 M.J. 270, 272 (C.M.A. 1990) (citing Article 66(c), UCMJ).

The elements of communication of a threat are set forth in Argument I, *supra*.

Analysis

SrA Pittman's conviction for wrongful communication of a threat is neither factually nor legally sufficient because the evidence does not establish the first and third elements for Article 115—the objective presence of a threat or subjective mens rea requirement for communication of the purported threat. Specifically, Article 115 requires that the Government prove the objective presence of a communication that qualifies as a threat and that the accused subjectively issued the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. *MCM,* Part IV, ¶ 53.b(c)(2). But the only witness to this charge, SrA TLP, did not establish that SrA Pittman communicated a present threat to shoot him, and, as such, SrA Pittman's conviction for Charge IV and its specification cannot be sustained.

As an initial matter, the Government has not even presented sufficient evidence that SrA Pittman made any communication as alleged in the specification. Neither A1C RL nor A1C DW recalled SrA Pittman threatening SrA TLP (R. at 175, 195), and in one version of SrA TLP's testimony, SrA Pittman appeared to say nothing. *See* R. at 195. Thus, it is unclear whether SrA Pittman made a communication at all, much less a threat to shoot SrA TLP.

Second, even if viewed in the light most favorable to the prosecution, any communication SrA Pittman made to SrA TLP's does not objectively qualify as a threat under Article 115. To establish the objective element, courts will analyze "the existence of a threat from the viewpoint of a 'reasonable person in the recipient's place.'" *United States v. Harrington*, __ M.J. __, 2023 CAAF LEXIS 577, at *8-9 (C.A.A.F. 2023) (quoting United *States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995) (emphasis omitted)).

The court's inquiry examines the language of the communication and its surrounding context. *Id*. And here, the communication in question, assuming any was made at all, was SrA Pittman's response to a question directly posed to him, consisting of one word— "yes."[12] R. at 208.

But is a mere affirmation to a question qualify as an objective threat under the *MCM*? In this context, no. The *MCM* defines "threat" as "an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy

[12] Neither the specification nor the Government's theory of the case indicate that SrA TLP's testimony that SrA Pittman told him to get on his knees and beg for mercy was the alleged threat in this case. *See* R. at 208.

certain property presently or in the future." Military case law suggests that the threat, even taken in context with associated actions, requires more than a simple response to a question, but rather an affirmative statement from the declarant. *See, e.g., Harrington*, 2023 CAAF LEXIS 577, at *10 ("whoever the sick sadistic mf who did this I'm going to kill'"; "I'm f**king dead as [sic] serious"; "[t]ell me who did it and I'll go easy on you"); *Rapert,* 75 M.J. 165-67 (affirmative statement by appellant that would "make it my last order to kill the President"). And here the statement of a present intent to shoot originated, not from SrA Pittman, but from SrA TLP.

Finally, even if this Court were to find the objective presence of a threat, the Government failed to establish SrA Pittman's subjective intent to threaten SrA TLP. In analyzing this element, it is essential that the reviewing court analyze the context, including "both the words used and the surrounding circumstances" when determining subjective intent of a threat. *United States v. Brown*, 65 M.J. 227, 232 (C.A.A.F. 2007). The initial iteration of SrA TLP's testimony described how SrA Pittman automatically responded to a question posed directly to him in a highly stressful situation after SrA TLP essentially dared him to shoot him. *See* R. at 213. As trial defense counsel observed, the evidence appeared to show that SrA Pittman was on "autopilot" when he answered to an escalating situation rather than actually intending to threaten SrA TLP by his words. R. at 276. As such, because the evidence does not show a threatening communication or the requisite level of intent to communicate one, SrA Pittman's conviction for Charge IV and its specification is neither legally nor factually sufficient.

WHEREFORE, SrA Pittman respectfully requests that this Court set aside the findings of guilt for Charge IV and its specification.

IV.

THE 326-DAY PERIOD FROM PREFERAL OF CHARGES TO ARRAIGNMENT VIOLATED SRA PITTMAN'S RIGHT TO SPEEDY TRIAL UNDER RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT.

Additional Facts

A. Speedy trial timeline

On 27 May 2021, the charges here were preferred against SrA Pittman. Charge Sheet, Vol. 1. ROT. That same day, the Special Court Martial Convening Authority, the 341st Missile Wing (MW) Commander, appointed Major (Maj) BP to serve as the Preliminary Hearing Officer (PHO) to examine SrA Pittman's charges pursuant to Article 32, UCMJ. Memorandum to Maj BP, dated 27 May 21, Vol. 5, ROT.

On 16 June 2021, Defense made a request for speedy trial in its initial discovery request. Defense's Discovery Request, dated 16 June 2021, Appellate Exhibit (App. Ex.) XV at 35.

The parties participated in the Article 32 hearing on 25 June 2021 (first Article 32 hearing), and the report was completed on 7 July 2021. PHO Report, dated 7 July 2021, Vol. 5, ROT (First PHO Report). At the hearing, trial defense counsel objected to Major BP serving as the PHO and requested that he recuse himself due to his roles as supervisor and mentor of the government counsel and due to his role as military justice advisor at Malmstrom's legal office. First PHO Report at 4. Major BP denied

the request and continued the hearing. *Id*. at 4-5. Still, he noted that he granted a Defense request to delay the hearing from 9 June to 25 June 2021. *Id*. at 3.

On 13 August 2021, the Staff Judge Advocate (SJA) issued the first pretrial advice. First Pretrial Advice, dated 13 August 2021, Vol. 4, ROT. The General Court Martial Convening Authority (GCMCA) referred charges on 30 August 2021. Original Charge Sheet, App. Ex. XV at 21; 1st Ind to 20 AF/JA, dated 30 Aug 2021, Vol. 4, ROT.

On 16 September 2021, the Chief Circuit Military Judge for the Western Circuit issued a scheduling order setting SrA Pittman's arraignment for 28 October 2021 and trial on 28 February 2022. Confirmation of Arraignment and Initial Trial Dates memorandum, dated 16 September 2021, App. Ex. XV at 55. She excluded 20 September 2021 to 27 October 2021 for speedy trial purposes in accordance with R.C.M. 707. *Id.* Before the scheduled arraignment, the Defense filed a Motion for Appropriate Relief, requesting a new Article 32 hearing after reiterating the Defense's objection to Major BP's partiality as the PHO. App. Ex. II.

On 28 October 2021, the military judge[13] conducted the schedule Article 39(a) session. R. at 2-98. At this initial hearing, the court attempted to arraign SrA Pittman based on the 30 August 2021 referred charges; he deferred entry of his

[13] Col Christina Jimenez conducted the initial Article 39a session and issued her ruling on the Article 32 motion. R. at 2; App. Ex. IV. Lt Col Dayle Percle was later detailed to conduct SrA Pittman's court-martial and issued the ruling on trial defense counsel's speedy trial motion. R. at 100, 105; App. Ex. XIX.

pleas. R. at 14, 97-98. The military judge informed the parties that her rulings on the pending motions would be forthcoming. R. at 97.

On 6 November 2021, the military judge ruled that the preliminary hearing was not in compliance with Article 32 and that SrA Pittman was entitled to a new Article 32 hearing, finding Major BP's role over military justice matters at the 341 MW legal gave an appearance of bias. App. Ex. IV at 13-14. The military judge ultimately held that "the preliminary hearing was not in substantial compliance with Article 32 and R.C.M. 405" and that SrA Pittman was entitled to a new Article 32 hearing and new pretrial advice. *Id*. at 14.

On 29 November 2021, based on the military judge's ruling, the GCMCA withdrew the 30 August 2021 referral of charges. Withdrawal of Referral memorandum, dated 29 November 2021, App. Ex. XV at 72, Vol. 4, ROT. That same day the GCMCA designated Major JK to conduct the new Article 32 hearing. Memorandum to Maj JK, dated 29 Nov 21. App. Ex. XV at 78-70, Vol. 4, ROT.

The new Article 32 hearing (second Article 32 hearing) was conducted on 21 December 2021, and the PHO issued the report on 29 December 2021. PHO Report, dated 29 December 2021 (2nd PHO report), Vol. 4, ROT. There were no requested delays from either the Government or Defense. 2nd PHO report at 1.

On 6 January 2022, trial counsel submitted a request to the GCMCA to exclude the period from 20 September 2021 until 27 February 2022 for speedy trial purposes. Request for Speedy Trial Exclusion, dated 6 January 2022, App. Ex. XV at 101-03. As the basis, the Government stated:

> SrA Pittman was arraigned within 120 days of preferral of charges. **Due to those charges having been withdrawn from that Court, that arraignment is no longer in force. For similar reasons, it is questionable whether the Military Judge's prior exclusion of time applies.** To account for the time during which defense counsel was not available for trial **and the time needed for a new Article 32 Preliminary Hearing**, you should exclude from 20 September 2021 to 27 February 2022 from speedy trial calculations.

Id. at 102 (emphasis added).

On 7 January 2022, the GCMCA issued a memorandum that read as follows: "After careful consideration of the facts and circumstances of this case, I approve your request to exclude time from 20 September 2021 through 27 February 2022 in accordance with R.C.M. 707." 20 AF/CC Withdrawal of referral memorandum, dated 29 November 2021, App. XV at 105, Vol 4, ROT.

On 16 February 2022, the SJA issued the new Pretrial Advice. Second Pretrial Advice, dated 16 February 2022, Vol. 4, ROT. On 17 February 2022, the GCMCA referred the charges to a general court-martial. *See* Charge Sheet; Memorandum from 20 AF/CC, dated 17 Feb 22, App. Ex. XV at 109-110, Vol. 4, ROT.

On 3 March 2022, the Chief Trial Judge of the Air Force issued a memorandum confirming the initial trial date as 18 April 2022, appointing a new military judge for trial, and excluding the time from 6 March 2022 to 17 April 2022 for speedy trial purposes pursuant to R.C.M. 707. Memorandum for Counsel dated 3 March 2022, App. Ex. XV at 117. On 8 March 2022, the military judge issued a scheduling order, App Ex. X, and SrA Pittman was arraigned on 18 April 2022, R. at 113-14.

A summary of the timeline is provided below:

Timeline

27 May 2021	Charges preferred and first PHO appointed.
16 June 2021	Defense demand for speedy trial and first referral of charges
25 June 2021	First Article 32 hearing **(noting PHO's exclusion of time from 9 June to 25 June 2021).**
7 July 2021	First PHO report
16 September 2021	Chief Circuit Military Judge of the Western Circuit's scheduling order (**Exclusion of 20 September 2021 to 27 October 2021)**
28 October 2021	Attempted arraignment and hearing on motions.
6 November 2021	Military judge issued ruling on defense's motion and ordered a new Article 32.
29 November 2021	Convening authority withdraws charges and orders new PHO hearing
21 December 2021	Second Article 32 hearing.
29 December 2021	Second PHO report
6 January 2022	Trial Counsel's request to GCMCA to exclude time for speedy trial purposes
7 January 2022	GCMCA issued a memorandum purporting to exclude time **from 20 September 2021 through 27 February 2022**
16 February 2022	Second Pretrial Advice
17 February 2022	Referral of charges
3 March 2022	Chief Trial Judge of the Air Force's scheduling memorandum (**Excluding time from 6 March 2022 to 17 April 2022)**
18 April 2022	Arraignment

Total days from Preferral to 18 April 2022 arraignment: **326 days**

B. Speedy trial motion and the military judge's ruling on the motion

Trial defense counsel moved to dismiss all charges and specifications against SrA Pittman for violating R.C.M. 707 and the Sixth Amendment. App. Ex. XV. Trial defense counsel alleged that only 94 days[14] were properly excluded for speedy trial purposes: Major BP's exclusion from 9 June 2021 to 24 June 2021; the Chief Circuit Military Judge's exclusion from 20 September 2021 to 27 October 2021; and the Chief Trial Judge's exclusion of time from 6 March 2022 to 17 April 2022. *Id.* at 8. Trial defense counsel also argued that the remaining time—232 days—should be held against the Government for speedy trial purposes. *Id*. at 1, 7.

On 6 April 2022, the military judge issued a written ruling that denied trial defense counsel's motion to dismiss on speedy trial grounds. App. Ex. XIX. For defense's arguments under R.C.M. 707, she found that SrA Pittman was brought to trial within the requirements of R.C.M. 707 at the arraignment on 28 October 2021 on day 102 of the speedy trial clock. *Id*. at 7. As the basis of her finding that the first attempted arraignment tolled the speedy trial clock, she relied on CAAF's decision in *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003) to find that, because "no changes

[14] In his speedy trial motion, trial defense counsel included the following as properly excluded delays: Major BP's exclusion of time at the First Article 32 hearing from 9 June 2021 until 25 June 2021 and the Chief Circuit Military Judge's exclusion of time from 20 September to 27 October 2021, which appears to be the Government's case ready date until the day prior to the attempted arraignment on 28 October 2021. *See* App. Ex. XV at 8, 55. It is unclear whether these dates were validly excluded in accordance with R.C.M. 707(c)(1) in light of the invalidation of the Article 32 hearing, the invalid arraignment, and resulting improper referral. For the purposes of this brief, the R.C.M. 707 analysis will utilize trial defense' counsel's computation of days, but SrA Pittman does not concede that these time periods were validly excluded.

were made to the charges or specifications after the accused was called on to plea at the original arraignment or between the first and second Article 32," then the subsequent actions of reinvestigating, withdrawal of the charges, and referral were "administrative in nature." *Id*. at 7. In a footnote, the military judge observed that, if *Cooper* was "inapt," then the "convening authority was properly called on to exclude time in this case under R.C.M. 707(c) and had the authority to do so." *Id*. at 8 n. 11.

For the Sixth Amendment claim, she found that 326 days was not facially unreasonable and did not demonstrate any constitutional prejudice by the delay; thus, she found there was not sufficient to trigger a full Sixth Amendment analysis—addressing only the length of delay and prejudice prongs of the constitutional test. *See id*. For prejudice, the military judge determined that SrA Pittman's anxiety suffered because the delay in trial was insufficient to show prejudice. *Id*. She also found that the defense would not be impaired because SrA Pittman "has been able to have unfettered contact with his defense team, to prepare matters for his trial, to participate in the development of defense strategy, to provide inputs on his defense, to obtain the relief he requested in a new Article 32 hearing, take leave, and otherwise effectively participate in the preparation of his defense, despite the disputed delay." *Id*. at 8-9. Thus, the military judge held no Sixth Amendment violation. *Id*. at 9.

Standard of Review

Whether an appellant was denied his right to speedy trial is reviewed under a de novo standard of review. *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2021); *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). This Court is bound

by the facts as found by the military judge unless those facts are clearly erroneous. *United States v. Wilson,* 72 M.J. 347, 350 (C.A.A.F. 2013).

Law and Analysis

Both R.C.M. 707 and the Sixth Amendment provide standards for an accused's right to a speedy trial. *United States v. Ruffin*, 48 M.J. 211, 212 (C.A.A.F. 1998). In the pertinent part, R.C.M. 707(a)(1) provides that the accused must be taken to trial within 120 days of preferral charges. For purposes of R.C.M. 707, an "accused is brought to trial . . . at the time of arraignment." R.C.M. 707(b)(1). The rule allows certain days "shall not count for [the] purpose of computing time." R.C.M. 707(b)(1). Prior to referral, "[a]ll . . . pretrial delays approved by a military judge or the convening authority shall be . . . excluded" from the 120-day clock imposed by R.C.M. 707(c)(1). After referral, only the military judge has the authority to approve pretrial days that are excluded from the 120-day clock. R.C.M. 707(c)(1).

The constitutional standard of the Sixth Amendment provides that the accused shall enjoy the right to a speedy and public trial. U.S. CONST. amend. VI; *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007). In determining Sixth Amendment violations, the Court weighs four factors recognized in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether there is a Sixth Amendment violation: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's demand for a speedy trial; and (4) the prejudice to the accused. *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021).

A. The Government exceeded R.C.M. 707's 120-day clock because of the invalid 28 October 2021 arraignment and the GCMCA's improper exclusion of time

The military judge made two fundamental errors in her R.C.M. 707 ruling. First, she incorrectly found that the 28 October 2021 attempt to arraign SrA Pittman stopped the speedy trial clock despite the prior military judge's invalidation of the Article 32 hearing. Second, she found that the GCMCA's exclusion of time from 20 September 2021 to 27 February 2022 was valid. As described below, the Government's failures resulted in at least 232 days of non-excludable time from preferral to arraignment—a clear violation of R.C.M. 707's speedy trial requirement.

1. The 28 October 2021 arraignment did not toll the speedy trial clock under R.C.M. 707(c)

The military judge erred when she determined that the 28 October 2021 arraignment had tolled the speedy trial clock pursuant to R.C.M. 707. According to the military judge's ruling, the referred charges were based on an invalid Article 32 hearing and invalid pretrial advice. R.C.M. 601(d)(2) explicitly provides that the convening authority may not refer a specification under a charge to a general court-martial unless "substantial compliance with the preliminary hearing requirements of R.C.M. 405" and the convening authority has received the pretrial advice. The attempted 8 October 2021 arraignment was a legal nullity based on invalidly referred charges flowing from legally defective pretrial advice derived from what the military judge found was an improperly conducted preliminary hearing. *See, e.g., United States v. Cooley,* 75 M.J. 247, 254 (C.A.A.F. 2016) (noting that an earlier arraignment was "a legal nullity" because it was held over the accused's objection during the five-

day statutory waiting period, which did not stop the R.C.M. 707 speedy trial clock); *United States v. Dudley*, 24 C.M.R. 607 (A.F.B.R. 1957) (findings of guilty to defective specifications are a "nullity" and the findings are declared invalid). Thus, any attempted arraignment on the charges could not toll the speedy trial clock under R.C.M. 707. *See United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F 1997) (analyzing what periods can be excluded for speedy-trial purposes).

And because the convening authority withdrew but did not dismiss the charges, the speedy trial clock continued to run. *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014) ("If charges are merely withdrawn and not subsequently dismissed, however, the R.C.M. 707 'speedy-trial clock continues to run.'") (quoting *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988)). Despite the Government's admission that the arraignment essentially had no legal effect, App. Ex. XV at 102,[15] the military judge still determined that 28 October 2021 attempted arraignment tolled the speedy trial clock because the actions taken in response to the invalidation of the First Article 32 were "administrative in nature." App Ex. XIX at 7-8. But this ruling was entirely based on a misreading of *United States v. Cooper*, a case involving alleged violations of Article 10, UCMJ, and not tolling of the speedy trial clock under R.C.M. 707. *See id.* Indeed, citing *Cooper*, the military premised her ruling on the incorrect legal conclusion that if charges "are referred to trial, and later those charges and specifications are withdrawn, but not dismissed and

[15] The Government conceded, "Due to those charges having been withdrawn from that Court, that arraignment is no longer in force." App. Ex. XV at 102.

reinvestigated with substantially the same evidence a new article 32, UCMJ hearing and the re-referred to trial without change, the original arraignment serves to stop the R.C.M. 707 clock." App. Ex. XIX at 7.

But this interpretation is incorrect for two reasons. For one, as mentioned previously, *Cooper* was an interlocutory appeal that did not address the effect of invalid arraignments on the R.C.M. 707 clock, but rather addressed attributable delays of post-arraignment time for Article 10 violations and the proper factors used in analyzing alleged Article 10 violations. *See Cooper*, 58 M.J. at 57. The military judge appears have based her finding, not on CAAF's holding, but on a footnote in the case that reflects what the military judge stated during trial: "However, the military judge concluded these re-referrals 'were administrative in nature and reflected identical charges and specifications as the original referred charges….They are permissible and do not restart the Rule 707 clock. Therefore, [Appellant] was arraigned [on July 6,] within the 120-day requirement of R.C.M. 707.'" *See* App. Ex. XIX at 7-8, *compare with Cooper*, 57 M.J. at 55 n.2.

Second, even if *Cooper* has some limited value, the facts of the case are distinguishable. In *Cooper*, the military judge "reopened" an Article 32 hearing due the court's finding that the Government improperly denied an individual military defense counsel request and because of the failure of the Article 32 hearing officer to provide summarized statements of the witnesses. 58 M.J. at 55. Notably, the same Article 32 Investigating Officer was used in the later hearing and no substantive matters were presented at that hearing. *Id*. at 56.

Cooper is not analogous to this case. Here, the situation did not involve a "reopening" of the Article 32 to correct limited errors as in *Cooper* but rather a wholesale invalidation of the entirety of the first Article 32 hearing. Thus, the second Article 32 was not part and parcel of "administrative task[s]," as the military judge found, but the first substantive hearing provided by the Government in accordance with the R.C.M.s and Article 32, UCMJ. *See* App. Ex. XV at 7. Because her ruling was based on *dicta* taken out of context in *Cooper*, the military judge's ruling that the attempted arraignment tolled the R.C.M. 707 speedy trial clock is wrong as a matter of law.

In sum, the defective arraignment did not stop the R.C.M. 707 speedy trial clock. A military judge cannot simply validate an otherwise legally void arraignment by characterizing later actions as "administrative." CAAF has recognized the legal significance of an accused's arraignment: "[A]rraignment serves to protect an accused's rights. After arraignment, the power of the military judge to process the case increases, and the power of the convening authority to affect the case decreases." *United States v. Doty*, 51 M.J. 464, 465-66 (C.A.A.F. 1999). But the military judge's ruling effectively diminished the importance of this crucial event by allowing it to rest on the unstable foundation of an invalid preliminary hearing.

2. The GCMCA's exclusion of time

The convening authority granted the Government's request well after it had exceeded the speedy trial clock. But not all exclusions of time are valid. "Applying the speedy trial provisions of R.C.M. 707(c) does not merely consist of calculating the

passage of calendar days." *Guyton*, 82 M.J. at 151. Certain days may be "excludable." R.C.M. 707(c). The R.C.M. "does not preclude after-the-fact approval of a delay"; however, such post hoc exclusions will be reviewed with "considerable skepticism." *Thompson*, 46 M.J. at 475. Moreover, "the Government runs a substantial risk by seeking approval from a convening authority only after a delay has occurred." *Id.* (*citing United States v. Dies*, 45 M.J. 376, 378 (C.A.A.F. 1996)). Exclusions must be subject to "good cause" and the length of the delay must be "reasonable." *Guyton*, 82 M.J. at 151.

The Government's last-minute attempt to exclude time for speedy trial occurred well after its R.C.M. 707 clock had run—*on day 172* (when excluding valid delays). This is the exact type of post hoc exclusion that courts should view with "considerable skepticism." *See Thompson*, 46 M.J. at 475. Even accounting for the military judge's ruling granting a new Article 32 hearing on day 111 of non-excludable delays, the Government offers no valid reason for why it failed to request an exclusion of time before its 120-day clock had run or why it took nearly four additional months to withdraw, reinvestigate, and refer the charges. *See* App. Exs. XVI, XVIII.

3. Dismissal with prejudice

The only authorized remedy for contested charges under R.C.M. 707(d)(1) is dismissal of the charges with or without prejudice. "The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial." R.C.M. 707(d). And as reflected below, the speedy trial violation rose to the level of Constitutional prejudice. Moreover, R.C.M. 701(d) provides factors

to consider for determining dismissal with or without prejudice: "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." In the event that the Court finds that the Government has proven the constitutional error was harmless beyond a reasonable doubt, SrA Pittman's R.C.M. 707 violation would still warrant dismissal with prejudice based on these factors. The charges here relate to a brief altercation between two airmen that led to no serious injuries with few witnesses and limited evidence. Despite this fact, as described above, the Government inexplicably failed to appoint an impartial PHO and dragged its feet on processing this case over defense objection, leading to unnecessary delay and, worse yet, the inability of the witnesses to fully recollect the events of the night in question. *See* Argument III.B, *infra.* Re-prosecution of these offenses would only worsen the witnesses' recollection even more and potentially lead to more issues prosecuting this case. Thus, the charges should be dismissed with prejudice for violations of SrA Pittman's right to speedy trial under R.C.M. 707.

B. The period from preferral to trial violated SrA Pittman's speedy trial right under the Sixth Amendment

Additionally, SrA Pittman was denied his right to a speedy trial in violation of the Sixth Amendment. In accordance with Supreme Court precedent, this Court weighs the following four factors from *Barker v. Wingo* to determine if there is a Sixth Amendment Speedy Trial violation: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's demand for a speedy trial; and (4) the prejudice to the

accused.[16] *Guyton*, 82 M.J. at 152. As reflected below, these factors weigh against the Government, and the Government cannot establish that the violation of SrA Pittman's Sixth Amendment right was harmless beyond a reasonable doubt.

1. *Length of delay*

From preferral to SrA Pittman's 18 April 2022 court-martial, 326 days elapsed.[17] The Government offered no reasoning for why a case involving one altercation and limited evidence would require such a lengthy delay. *See* App. Ex. XVI; *see also Barker,* 407 U.S. at 530-31 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). Prior cases have established that similar time frames weighed against the Government under a *Barker* analysis. *See Cooley*, 75 M.J. at 259-60 (finding that a 289-day delay was unreasonable when the reflected no additional investigation was conducted to justify waiting to refer a charge); *United States v. Grom*, 21 M.J. 53, 56 n.4, 58 (C.M.A. 1985) (holding that 244-day delay triggered the *Barker* analysis and stating that the 120-day requirement under R.C.M. 707 was "an indication of the amount of pretrial delay that is ordinarily tolerable in a military context"). As such, this factor should weigh against the Government.

[16] Notably, the military judge only analyzed two of the four factors in her ruling. App. Ex. XIX at 8-9.

[17] "Analysis of a Sixth Amendment speedy trial claim requires consideration of the entire period of delay from arrest (pretrial confinement) or preferral of charges until commencement of trial on the merits." *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) (citing *United States v. MacDonald*, 456 U.S.1, 6-8 (1982)).

2. *Reasons for delay*

Here, the reasons of the delay can only be attributed to the administrative failures of the Government. For one, the Government failed to ensure that SrA Pittman was afforded an impartial Article 32 hearing by appointing a member of the prosecuting legal office's leadership team to evaluate his subordinates' case and by then declining to yield when the defense objected to Major BP's participation at the first Article 32, which ultimately led to a substantial delay in this case. And as noted above, there is no explanation for why the Government took so long to process a relatively simple case. *See* App. Exs. XVI, XVIII.

"As a general matter, factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision…." *United States v. Thompson,* 68 M.J. 308, 313 (C.A.A.F. 2010). Moreover, because there is no evidence to explain the government's failure to move this case with reasonable diligence, this delay must be weighed against the Government. *See United States v. Hernandez*, ACM S32732, 2023 CCA LEXIS 320, at *16 (A.F. Ct. Crim. App. 2 Aug. 2023) (recognizing the Government's burden to demonstrate moving the case forward and finding that the delay must be weighed against the Government if no evidence to explain the delay).

As a result, because there is no indication in the record of the reasoning behind these delays, this factor should weigh against the Government.

3. *SrA Pittman's assertion of right to speedy trial*

It is uncontested that SrA Pittman made a request for speedy trial in this case. App. Ex. XV at 35. He did so within less than four weeks of preferral of charges. *Id.*

4. *Prejudice*

The final factor of prejudice should weigh against the Government when assessed in light of SrA Pittman's interests in speedy trial in this case. "Prejudice ... should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532. These interests are: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* (footnote omitted). "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *United States v. Johnson,* 17 M.J. 255, 259 (C.M.A. 1984).

SrA Pittman was prejudiced in two ways. First, the length of time to take him to trial impaired his defense against the charges, particularly the Article 115 charge for communication of a threat. Three of the Government's witnesses could not accurately remember important details from the alleged altercation, which may have shed light on SrA Pittman's actions during that night, including what was communicated between SrA Pittman and SrA TLP, or support potential defenses that SrA Pittman may have had. *See* R. at 210, 215 (SrA TLP testified he could only remember "bits and pieces" of the conversation he had with SrA Pittman and could not remember the severity of any injuries); R. at 175 (A1C RL would not recall a

threat to shoot the victim); R. at 194 (A1C DW could not remember if SrA Pittman made motions with a firearm or the content of the "dialogue" between SrA Pittman and SrA TLP). Even trial counsel acknowledges that the witnesses do not remember portions of the altercation because "it's been a while ago." R. at 264. The Supreme Court has recognized that this inability to accurately remember relevant details could amount to prejudice in a speedy trial analysis. *Barker*, 407 U.S. at 532 ("There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.").

Second, as noted in trial defense counsel's speedy trial motion, due to his administrative hold at Malmstrom AFB for his court-martial, SrA Pittman was separated from his one-year-old son who was living in Texas at the time. App. Ex. XV at 15. His administrative hold status prevented him from seeking reassignment to join his son and, as a result, could only visit sporadically when SrA Pittman had available leave and was able to afford travel costs. *Id*. And the anxiety and strain caused by this separation and delay takes this out of the realm of normal anxiety experienced by members awaiting trial. *See Moore v. Arizona*, 414 U.S. 25, 27 (1973) (recognizing that prejudice to a defendant awaiting trial can take the form of anxiety to the defendant, his family, and friends). *Barker*, 407 U.S. at (White, J, concurring). ("[T]hese personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and loads."). Accordingly, this factor should weigh in favor of SrA Pittman.

In sum, each of the *Barker* factors weighs in favor of SrA Pittman. For the most important factor—prejudice—the record reflects that witnesses used against SrA Pittman could not accurately recall the events of the night in question. This factor alone should warrant dismissal with prejudice. In the words of our superior court, "[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system." *United States Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005). Thus, dismissal with prejudice is the appropriate remedy.

WHEREFORE, SrA Pittman respectfully requests that this Honorable Court dismiss all the charges with prejudice.

Respectfully submitted,

[redacted]

ANTHONY D. ORTIZ
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 8 September 2023.

Respectfully submitted,

[redacted]

ANTHONY D. ORTIZ
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force *Appellant*	)	No. ACM 40298 27 September 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a **14-day** enlargement of time to respond in the above-captioned case. This case was docketed with the Court on 5 October 2022. Since docketing, Appellant has been granted nine (9) enlargements of time. Appellant filed his brief with this Court on 8 September 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 357 days have elapsed since docketing. The United States' response in this case is currently due on 9 October 2023. If the enlargement of time is granted, the United States' response will be due on 23 October 2023. On the date requested, 383 days will have elapsed.

There is good cause for the enlargement of time. The undersigned counsel is traveling to the Republic of Korea on short notice to visit her last remaining grandparent, who is expected to pass away soon due to her rapidly deteriorating physical condition. Undersigned counsel expects to be overseas for nine (9) days. Appellant has raised four assignments of error in a 47-page brief. Undersigned counsel has finished reviewing the record and has started drafting the brief in [illegible] additional time is necessary to provide a fully responsive brief to assist this Court [illegible]66 review. There is no other appellate government counsel who would be able to

GRANTED
4 Oct 2023

file a brief sooner because they are also assigned extensive briefs and would have to first become familiar with the record of trial. In the past 30 days, undersigned counsel has filed one 4-issue brief at this Court (United States v. Dugan) and a 60 page brief at the Court of Appeals for the Armed Forces (United States v. Leipart). This case is now undersigned counsel's first priority.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 27 September 2023.

KATE E. LEE, Capt, USAF
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman (E-4) **TERRY L. PITTMAN III**, USAF Appellant.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 1 No. ACM 40298 23 October 2023

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

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v.	)	Before Panel No. 1
Senior Airman (E-4) **TERRY L. PITTMAN III** United States Air Force *Appellant.*	)	No. ACM 40298 23 October 2023

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

ISSUES PRESENTED

I.

WHETHER ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, IS UNCONSTITUTIONALLY VAGUE WHEN IT FAILS TO SPECIFY THE MENS REA LEVEL FOR ESTABLISHING WRONGFULNESS IN LIGHT OF COUNTERMAN V. COLORADO, 143 S. CT. 2106 (2023), AND WHERE THE MANUAL FOR COURTS-MARTIAL AND MILITARY CASE LAW FAILS TO ESTABLISH THE MENS REA LEVEL NECESSARY TO ESTABLISH WRONGFULNESS.

II.

ASSUMING ARGUENDO THAT ARTICLE 115 IS NOT UNCONSTITUTIONALLY VAGUE, WHETHER THE GOVERNMENT FAILED TO STATE AN OFFENSE UNDER ARTICLE 115, UNIFORM CODE OF MILITARY JUSTICE, WHEN IT FAILED TO ALLEGE THE REQUISITE MENS REA TO ALLOW SRA PITTMAN TO PREPARE HIS DEFENSE.

III.

WHETHER SRA PITTMAN'S CONVICTION FOR WRONGFUL COMMUNICATION OF A THREAT IN VIOLATION OF ARTICLE 115, UNIFORM CODE OF

MILITARY JUSTICE, IS LEGALLY AND FACTUALLY SUFFICIENT.

IV.

WHETHER THE 326-DAY PERIOD FROM PREFERAL OF THE CHARGES TO ARRAIGNMENT VIOLATED SRA PITTMAN'S RIGHT TO SPEEDY TRIAL UNDER RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT.

STATEMENT OF CASE

The United States agrees with Appellant's statement of the case.[1]

STATEMENT OF FACTS

The Incident

On the evening of 10 December 2020, Appellant informed his friends, A1C RL and A1C DW, that he wanted to confront SrA TLP for an alleged sexual assault of Appellant's spouse.[2] (R. at 170.) A1C RL and A1C DW attempted to calm Appellant down and suggested he contact "Security Forces, OSI, SAPR, whoever it was that needed to be contacted" instead of confronting SrA TLP himself. (R. at 171, 190.) Appellant, who was "angry" and "on a one-set path," did not respond to A1C RL or A1C DW's efforts to diffuse his heightened emotional state. (R. at 169, 171, 191.) Realizing that pacifying Appellant was futile, A1C RL and A1C DW decided to accompany Appellant to "make sure nothing got out of hand." (Id.) The three airmen then drove to a parking lot outside the dorms on Malmstrom AFB. (R. at 171, 191.)

Inside the dorms, SrA TLP received a phone call from a number that he did not recognize. (R. at 204.) Thinking it might be one of his tech school colleagues based on the area

[1] The Entry of Judgment contains a typographical error in Charge III, which says "Senior Airman Terry L. *Phillips,*" when it should say "Senior Airman Terry L. *Pittman*." (*Entry of Judgement*, ROT, Vol. 1.)

[2] The allegation against SrA TLP was ultimately disposed of with no action. (App. Ex. VII.)

code, SrA TLP answered. (Id.) On the other end was Appellant, who claimed that his car was "broke down" and asked for SrA TLP's assistance. (R. at 172, 192, 204.) Although SrA TLP did not know Appellant, he agreed to assist out of "kindness" because it was "a cold night," and headed outside. (R. at 204.)

Once SrA TLP reached the parking lot, Appellant, A1C RL, and A1C DW emerged from the car. (R. at 172.) SrA TLP handed Appellant a generator for jump starting cars, asked him to return it when he could, and began to walk away. (R. at 207.) Appellant then asked SrA TLP if he knew Appellant's spouse, which SrA TLP denied. (R. at 173.) Appellant repeated his question, and SrA TLP replied that he did not know what Appellant was talking about. (R. at 173.) Appellant then told SrA TLP that he "better remember" and pulled a Glock handgun out of his waistband, to the surprise of everyone else present. (R. at 174-175, 194-195, 207.) He then "racked the slide to show force … to make sure that [SrA TLP] was scared."[3,4] (R. at 253.)

SrA TLP asked Appellant if he was going to shoot him, and Appellant replied, "Yes." (R. at 208.) SrA TLP then told Appellant to "go ahead," at which point Appellant demanded that SrA TLP "get on [his] knees and beg for mercy." (R. at 208.) SrA TLP refused, at which point Appellant became angry and hit SrA TLP on the side of the head, near his ear. (R. at 174-175, 195, 208.) Having just been attacked, SrA TLP then swung at Appellant. (R. at 176.)

In the ensuing tussle, Appellant dropped the gun. (R. at 195.) It was at this point that A1C RL examined the gun and realized that it was his. (R. at 177.) Meanwhile, the fight continued, as Appellant pursued SrA TLP—who was trying to get away from him—across the

[3] Various witnesses described this action in different terms: "slid the action back" (R. at 174); "charged it" (R. at 207); "cocked it back" (R. at 207); "racked the slide" (R. at 253).

[4] This was an admission that Appellant later made to his First Sergeant, who testified to the same at trial. (R. at 253.)

parking lot until they "ended up getting into it and getting on the ground." (R. at 176.) As A1C RL and A1C DW approached to intervene, Appellant demanded that A1C RL "give [the gun] back to [him]." (R. at 178.) A1C RL refused. (Id.) Eventually, A1C RL and A1C DW separated Appellant and SrA TLP, and the altercation came to an end. (R. at 179.)

The Trial

Appellant was charged, *inter alia*, one specification alleging wrongful communication of a threat. The specification, as stated on the charge sheet used at trial, read as follows:

> In that SENIOR AIRMAN TERRY L. PITTMAN, United States Air Force, 819th RED HORSE Squadron, Malmstrom Air Force Base, Montana, did, at or near Malmstrom Air Force Base, Montana, on or about 11 December 2020, wrongfully communicate to Senior Airman Travis L. Phillips a threat to shoot him with a firearm.

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

Prior to trial, the Article 115 charge was examined by two different preliminary hearing officers, both of whom concluded that the specification alleged an offense and was in proper form. (App. Ex. I at 44; *Preliminary Hearing Report*, ROT, Vol. 5.) During motions practice, Appellant did not challenge the Article 115 specification. (*See generally* R. at 15-96.)

At trial, the prosecution's primary evidence on this charge came from SrA TLP, who testified that he asked Appellant if he was going to shoot SrA TLP, "to confirm he was going to kill [SrA TLP]," and that Appellant said, "Yes." (R. at 208.) SrA TLP described thinking that "this was like [sic] a terrible place [to] die," and then telling Appellant to "go ahead and shoot [him]." (Id.) When asked why he told Appellant to shoot him, SrA TLP explained a feeling of resignation: "I just felt like, if that's what [Appellant] wanted to do, then so be it." (R. at 217.)

During the cross examination, trial defense counsel asked SrA TLP a series of leading questions that endeavored to minimize Appellant's role in the altercation. (R. at 213.) Trial

defense counsel steered clear of any questioning about SrA TLP's initial question to Appellant—whether the latter was going to shoot him—and Appellant's affirmative response to said question. (Id.) Instead, trial defense counsel only sought to confirm that SrA TLP, at some point, told Appellant to shoot him. (Id.) Consistent with his earlier testimony on direct examination, SrA TLP confirmed that he did. (Id.) However, at no point did SrA TLP testify that his exchange with Appellant was one-sided, such that Appellant was simply listening to SrA TLP. (*See generally* R. 213-214.)

A1C DW and A1C RL also testified at trial. (R. at 167-186, 187-201.) A1C DW recalled that there was "some kind of dialogue," but could not remember what it was because he was in a "shocked state" and "couldn't really fathom what was happening." (R. at 195.) Similarly, A1C RL could not remember whether Appellant threatened to shoot SrA TLP. (R. at 175.) Both of their testimonies otherwise corroborated SrA TLP's testimony that Appellant lured SrA TLP outside by claiming to have car issues; confronted SrA TLP about Appellant's spouse; pulled out a firearm and "charged" it; and hit SrA TLP with the firearm before the altercation devolved into a physical brawl. (R. at 172-178, 192-196.)

The prosecution rounded out its case with the testimony of Appellant's first sergeant at the time of the incident, SMSgt AT, who testified as follows. (R. at 252-253.) Sometime after the assault, Appellant asked SMSgt AT if they could "chat." (R. at 252.) Though SMSgt AT tried to stop Appellant from talking about the assault to protect his rights, Appellant elected to talk to him anyway. (R. at 252-253.) During the conversation, Appellant admitted to SMSgt AT that he took a gun—albeit unloaded—to the altercation with SrA TLP, and that he "racked the

slide to show force[5]…to make sure that the victim was scared." (R. at 253.) Appellant also told SMSgt AT that SrA TLP was crying at the time, and that there were two other people there. (Id.)

The defense did not present any witnesses or evidence.

The remaining facts necessary for the disposition of the issues are contained below.

ARGUMENT

I.

ARTICLE 115, UCMJ, IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE IT GIVES FAIR NOTICE OF WHAT CONDUCT IS PROHIBITED AND WHAT MENS REA IS REQUIRED.

Additional Facts

The statutory text of Article 115, UCMJ, reads as follows: "Any person subject to this chapter who *wrongfully* communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct." 10 U.S.C. § 915(a) (emphasis added).

To sustain a conviction for violation of Article 115, UCMJ, the prosecution is required to prove the following elements:

> (a) That the accused communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future;
>
> (b) That the communication was made known to that person or to a third person; and
>
> (c) That the communication was wrongful.

Manual for Courts-Martial, United States, part IV, para. 53.b(1) (2019 ed.) (MCM.)

[5] The intended effect of this action, if a firearm is loaded, is to "put a bullet into the chamber." (R. at 254.)

Standard of Review

The constitutionality of a statute is a question of law and is ordinarily reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000). However, when a vagueness challenge is forfeited by lack of objection at trial and is raised for the first time on appeal, it is reviewed only for plain error. *See* United States v. Steele, 83 M.J. 188, 191 (C.A.A.F. 2023) (noting that if an appellate court found that a vagueness challenge was forfeited, it must "at a minimum" review for plain error); *see also* United States v. Da Silva, ACM 39599, 2020 CCA LEXIS 213, *29 (A.F. Ct. Crim. App. 25 June 2020) (unpub. op.) (finding appellant's failure to raise a void for vagueness challenge at trial constituted forfeiture and reviewing for plain error).

Under plain error review, appellant bears the burden of showing that (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. United States v. Tunstall, 72 M.J. 191, 196 (C.A.A.F. 2013). "[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019); *but see* Greer v. United States, 141 S. Ct. 2090, 2097 (2021) ("The defendant has "the burden of establishing entitlement to relief for plain error."). This standard is met "where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." United States v. Upshaw, 81 M.J. 71, 74 (C.A.A.F. 2021).

Law and Analysis

The Fifth Amendment provides that "[n]o person shall…be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This due process guarantee requires that criminal statutes "give people of common intelligence fair notice of what the law demands of them." United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quotations omitted);

see also Winters v. New York, 333 U.S. 507, 515 (1948) ("Men of common intelligence cannot be required to guess at the meaning of the enactment."). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." City of Chicago v. Morales, 527 U.S. 41, 58 (1999). However, "[f]air notice does not depend on military case law or state statute alone." United States v. Vaughan, 58 M.J. 29, 32 (C.A.A.F. 2003). Such notice can also be found in the Manual for Courts-Martial. Id. at 31.

Where a statute fails to give fair notice or is "so standardless that it invites arbitrary enforcement," Johnson v. United States, 576 U.S. 591, 595 (2015), it is "void for vagueness." Colautti v. Franklin, 439 U.S. 379, 390 (1979). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." Parker v. Levy, 417 U.S. 733, 757 (1974) (citation omitted). A statute will not be deemed vague simply because "it may at times be difficult to prove an incriminating fact but rather because it is unclear as to *what* fact must be proved." FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012) (emphasis added); *see also* Elonis v. United States, 575 U.S. 723, 735 (2015) ("[A] defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime."). Determining the sufficiency of notice necessarily requires that a statute be examined "in the light of the conduct with which a defendant is charged." Parker, 417 U.S at 757. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Id. at 756.

In his first assignment of error, Appellant alleges that Article 115 is unconstitutionally vague because neither the statute, the Manual for Courts-Martial, nor military case law "specify the level of mens rea required for establishing wrongfulness." (App. Br. at 5.) As discussed

below, this claim is without merit. Appellant fails to establish error whatsoever, much less plain and obvious error that substantially prejudiced a material right.

A. Appellant has failed to demonstrate error because a person of common intelligence would reasonably understand what kind of conduct is prohibited by the statutory text of Article 115.

The test for vagueness asks whether a criminal statute "give[s] people of common intelligence fair notice of what the law demands of them." Davis, 139 S. Ct. at 2325. Here, a straightforward reading of Article 115's text gives a reader of common intelligence ample notice of what conduct is proscribed: "Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct." 10 U.S.C. § 915(a). The statute unambiguously sets forth "what fact[s] must be proved" to hold Appellant accountable for a violation of Article 115. Fox, 567 U.S. at 253.

Although Appellant implies that the use of the term "wrongfully"—as opposed to reckless, knowing, or purposeful—is insufficient notice of the mens rea requirement, this Court should not be persuaded. The articulated purpose of the fair notice requirement—"to enable the ordinary citizen to conform his or her conduct to the law," Morales, 527 U.S. at 58—necessarily assumes that a person of common intelligence can distinguish lawful from unlawful conduct. It logically follows, then, that such a person would appreciate the difference between right and wrong, and by extension, understand the term "wrongfully" as requiring a blameworthy state of mind. *See* Elonis, 575 U.S. at 724 (discussing the "basic principle that wrongdoing must be conscious to be criminal").

Moreover, as the Supreme Court noted in Parker, the sufficiency of notice must be evaluated in "in the light of the conduct with which [Appellant] is charged." 417 U.S. at 757. Appellant was charged with communicating a threat to shoot SrA TLP with a gun. "True threats

are serious expression[s] conveying that a speaker means to commit an act of unlawful violence." Counterman v. Colorado, 143 S. Ct. 2106, 2114 (2023) (citation omitted). Such threats, "everyone agrees, lie outside the bounds of the First Amendment's protection," id. at 2113, and the plain language of Article 115 provides fair notice that such conduct is prohibited. Appellant expressed that he was going to shoot SrA TLP *while* he had a gun in his hand and *after* he "racked the slide to show force … to make sure [SrA TLP] was afraid." (R. at 253.) Under these circumstances, it is difficult to imagine a universe in which a person in Appellant's position would be unsure of how his conduct "fit[s] the definition" of an Article 115 offense, which requires that he intended for his words to be threatening or knew that they will be perceived as such. Elonis, 575 U.S. at 735.

Because "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Parker, 417 U.S. at 756, Appellant's claim that Article 115 is void for vagueness is without merit and the analysis should end here. Nevertheless, the Government addresses, *arguendo*, Appellant's other assertions as to vagueness.

B. The statutory text of Article 115 and the Manual for Courts-Martial set forth a mens rea requirement.

In support of his contention that Article 115 is unconstitutionally vague, Appellant alleges that the "statutory language for Article 115 does not provide a requirement for mens rea" and "no source of military law … establishes the level of mens rea" required for a conviction under Article 115. (App. Br. at 7-8.) This is patently untrue.

First, contrary to Appellant's assertions, the text of Article 115 *does* contain a mens rea requirement—the statute's use of the term "wrongfully" is dispositive on this point. "The word 'wrongful,' like the words 'willful,' 'malicious,' 'fraudulent,' etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act." United States v. Thomas, 65 M.J.

132, 134 (C.A.A.F. 2007) (quoting Masters v. United States, 42 App. D.C. 350, 356 (D.C. Cir. 1914)). Thus, "[t]he wrongfulness of [an] act obviously relates to mens rea (not elsewhere specified amongst the elements)." United States v. Rapert, 75 M.J. 164, 169 (C.A.A.F. 2016). Accordingly, the use of the word "wrongful" in the text of Article 115 provides notice that the prosecution must prove a criminal state of mind.

However, even if this Court agrees with Appellant and finds that the statutory text of Article 115 is "silent on the mental state requirement" because it does not expressly specify one or more of the three "levels" of mens rea,[6] that is still not cause for finding it void for vagueness. *See* Elonis, 575 U.S. at 734. That is because the Manual—which explains exactly the levels of mental culpability that would satisfy the mens rea requirement for a violation of Article 115—also serves as a source of fair notice. Vaughan, 58 M.J. at 31. Though not binding, the President's explanations of offenses in the Manual are considered persuasive authority. United States v. Contreras, 69 M.J. 120, 121 n.2 (C.A.A.F. 2010). In defining "wrongful" under Article 115, the Manual explicitly notes that it "relates to the accused's subjective intent" and that this "mental state requirement is satisfied if the accused transmitted the communication *for the purpose* of issuing a threat or *with knowledge* that the communication will be viewed as a threat." MCM, pt. IV, para. 53.c(2) (emphasis added). This explanation unequivocally sets forth the states of mind that would make someone culpable under Article 115. The servicemember must either specifically intend to make a threat or know the communication will be viewed as such. Considering this, the Court should be unpersuaded by Appellant's contention that "subjective intent to establish wrongfulness of a threat has been an elusive concept in military

[6] *See* Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (noting that "the law of mens rea offers three basic choices" of purpose, knowledge, and recklessness).

law" (App. Br. at 14), which ignores—perhaps wishfully—the Manual's definition of the very same. Similarly, Appellant's concern with the absence of military case law addressing "what level of mens rea is required" (App. Br. at 9) is inapposite, as it ignores the obvious—military case law need not address the level of mens rea required because the President, through the explanations and definitions in the Manual, has done precisely that.

Though Appellant seems to suggest that the Manual's failure to further define the phrases "for the purpose" or "with knowledge" nevertheless makes the mens rea requirement unclear (App. Br. at 8), this argument is without merit. It is a fundamental canon of statutory construction that, unless otherwise defined, words are to be given their ordinary, everyday meaning. The words "for the purpose" and "with knowledge" are not complex, technical terms requiring detailed explanations. That the Manual did not further expound on their meaning does not somehow make their import less clear.

Moreover, "[w]here the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, an appellate court will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution." Contreras, 69 M.J. at 121 n.2. Such is the case here. The President's explanation of "wrongfully" narrows the aperture of mens rea by excluding the lowest level of the mental state hierarchy—recklessness—and requiring a minimum of purpose or knowledge. *See* MCM, pt. IV, para. 53.c(2). This narrowing construction is not inconsistent with the language of Article 115 and is favorable to those accused of violating it, as "[a] strong scienter requirement helps to diminish the risk of 'overdeterrence,' i.e., punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line." Xiulu Ruan v. United States, 142 S. Ct. 2370, 2378 (2022). Understanding, then, that the President's

construction of the Article 115 offense is not to be disturbed, this Court will ultimately reach the same result—a finding that Article 115 contains a mens rea requirement that is *more* than "only that … which is necessary to separate wrongful conduct from otherwise innocent conduct." Elonis, 575 U.S. at 736 (quotations omitted). Accordingly, Appellant's claim that Article 115 is unconstitutionally vague due to the absence of a mens rea requirement is without merit.

C. Article 115 already contains a higher mens rea requirement than the minimum articulated in Counterman v. Colorado, which prevents arbitrary or discriminatory enforcement.

In asserting that Article 115, UCMJ, is unconstitutionally vague, Appellant relies heavily on the recent Supreme Court decision in Counterman v. Colorado, 143 S. Ct. 2106, 2113 (2023). Appellant cites Counterman for the proposition that "one of the three levels of mens rea" and the "specific level of intent" must be specified in the text of a criminal statute. (App. Br. 11-12.) However, as discussed below, Appellant's reliance on—and interpretation of—Counterman is misplaced.

In Counterman, the Supreme Court confronted the question of whether the First Amendment required the prosecution to put on evidence of a defendant's subjective intent in true-threats cases. 143 S. Ct. at 2111. After examining the three levels of mens rea—purpose, knowledge, and recklessness—the Supreme Court held that the state must prove "a mental state of recklessness" in true-threats prosecutions. Id. at 2111. As the basis for this decision, the Court invoked the need to balance the "constitutional interest in free expression" with "protecting against the profound harms, to both individuals and society, that attend true threats of violence." Id. at 2117.

> [A]s we go up the subjective mens rea ladder, that imposition on States' capacity to counter true threats becomes still greater—and, presumably, with diminishing returns for protected expression. In advancing past recklessness, we make it harder for a State to substantiate the needed inferences about mens rea (absent, as is

> usual, direct evidence). And of particular importance, we prevent States from convicting morally culpable defendants.

Id. at 2118.

Using a recklessness standard, the Court opined, "offers enough 'breathing space' for protected speech, without sacrificing too many of the benefits of enforcing laws against true threats." Id. at 2119. The case was then remanded for further proceedings based on the state's failure to present any evidence of the accused's subjective intent. Id.

In brief, the Counterman holding requires prosecutors in true-threats cases to put on, at a minimum, evidence of recklessness on the part of the accused. Id. at 2112. But, because Article 115 *already* requires a mens rea greater than recklessness, Counterman does not change the landscape of military threats prosecutions whatsoever.

The question, then, is whether Counterman has any implications for the constitutionality of Article 115. It does not. Although Appellant asserts that "Counterman makes it clear that one of the three levels of mens rea must be adopted" (App. Br. at 11), this ignores the reality that Counterman did not address or call into question the statute from which the conviction in that case sprang. 143 S. Ct. at 2112. Nowhere in the opinion did the Supreme Court suggest that criminal statutes must pick only one of the three levels of mens rea and specify it in the text of the statute. *See generally* id.

Nevertheless, Appellant contends that Article 115 lacks "clarity" and that "the [Manual] muddies the waters by appearing to adopt two differing levels of mens rea for establishing the same element," which Appellant further contends "encourages discriminatory enforcement by providing multiple standards." (App. Br. at 11.) This Court should give little weight to Appellant's cursory recitation of the vagueness test and look instead to Elonis, 575 U.S. at 733.

In Elonis, the Supreme Court examined mens rea as it related to a federal threat statute—18 U.S.C. § 875(c)[7]—that was "silent" in its text about the mental state requirement. 575 U.S. at 733-737. Noting that "[t]he fact that the statute does not specify any required mental state… does not mean that none exists," the Supreme Court "read into the statute" a mental state requirement. Id. at 734, 737. This requirement, per the Court, would be satisfied "if the defendant transmits a communication *for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat*." Id. at 724-725 (emphasis added). In other words, the idea that one could be culpable for a threat under *either* a purposeful or knowing state of mind has been sanctioned by the highest court in the land. Thus, Appellant's assertion that "one of the three levels must be adopted" fails. (App. Br. at 11.)

D. Conclusion

Article 115 is not unconstitutionally vague because (1) a plain reading of the statutory text would give a person of common intelligence fair notice of what conduct is prohibited, and (2) it contains a mens rea requirement that (3) exceeds the minimum articulated in Counterman. In light of the foregoing, Appellant has failed to meet his burden of demonstrating that there was error whatsoever. As a result, this Court need not consider the second and third prongs of the plain error test. Appellant's assignment of error is without merit.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the conviction and sentence.

[7] "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." 18 USCS § 875(c).

II.

THE GOVERNMENT DID NOT FAIL TO STATE AN OFFENSE BECAUSE THE SPECIFICATION ALLEGES THE REQUISITE MENS REA BY IMPLICATION.

Standard of Review

"The question of whether a specification states an offense is a question of law, which this Court reviews de novo." United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006).

Law

"A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." Id. If a specification is first challenged after trial, "the sufficiency of the specification may be sustained 'if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.'" Id. (quoting United States v. Mayo, 12 M.J. 286, 288 (C.M.A. 1982)). Such a specification will be "viewed with greater tolerance than one which was attacked before findings and sentence" and will be "liberally construe[ed] … in favor of validity when they are challenged for the first time on appeal." United States v. Turner, 79 M.J. 401, 405 (C.A.A.F. 2020) (citing United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986)). In other words, when a failure to state an offense claim is first raised after trial, the claim will fail "absent a clear showing of substantial prejudice to the accused, such as a showing that the [specification] is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" Turner, 79 M.J. at 406 (quoting United States v. Thompson, 356 F.2d 216 (2d Cir. 1965)).

Analysis

Appellant alleges for the first time on appeal that the Article 115 specification fails to state an offense because it "[does] not allege any level of mens rea in the specification." (App. Br. at 13.) However, his claim fails because (1) contrary to Appellant's belief, the specification properly alleges every element of the offense, and (2) Appellant has not made a "clear showing" as to how the purported omission of the mens rea resulted in "substantial prejudice." Turner, 79 M.J. at 406.

As a preliminary matter, because Appellant challenges the specification for the first time on appeal, it should be "liberally construe[ed] … in favor of validity." Turner, 79 M.J. at 405. However, even without the liberal construction, the contested specification survives scrutiny because it is in proper form, as it expressly alleges all three elements required for an Article 115 offense:

Charge IV, Specification[8]	**Elements of Article 115**[9]
In that SENIOR AIRMAN TERRY L. PITTMAN, United States Air Force, 819th RED HORSE Squadron, Malmstrom Air Force Base, Montana, did, at or near Malmstrom Air Force Base, Montana, on or about 11 December 2020, wrongfully(c) communicate to Senior Airman Travis L. Phillips(b) a threat to shoot him with a firearm.(a)	(a) That the accused communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future; (b) That the communication was made known to that person or to a third person; and (c) That the communication was wrongful.

[8] (*Charge Sheet*, ROT, Vol. 1.)
[9] MCM, part IV, para. 53.b(1).

Second, because the specification alleges every element of the offense, it implicates the underlying definitions contained in the Manual. In other words, the specification alleges the requisite mens rea—as articulated in the Manual's definition of "wrongful"—by *implication*. Since the specification was not challenged at trial, its sufficiency may be sustained because "the necessary facts appear in any form or by fair construction … within the terms of the specification." Crafter, 64 M.J. at 211.

In maintaining that this specification is nevertheless flawed, Appellant asserts that the specification "does not allege the *level* of wrongfulness either directly or by implication." Echoing his earlier claims of void-for-vagueness, Appellant contends that he "did not receive notice of the required *level* of mens rea he needed to defend against and there was no indication at trial of the Government's theory of the offense."[10] (App. Br. at 15-16) (emphasis added). This argument suffers from a fatal flaw: it blatantly overlooks the Manual's force and effect as a source of persuasive authority in military law. Adopting Appellant's position—that the specification must state the *level* of mens rea, even though it is defined in the Manual—would, by extension, require the recitation of every defined term within the body of any given specification. Such an approach would be untenable and unduly onerous.

Moreover, Appellant seeks to expand the scope of the "notice" requirement beyond what our jurisprudence requires. Due process mandates fair—*not exhaustive*—notice.

> The root of the vagueness doctrine is a *rough* idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and

[10] Contrary to Appellant's assertion, the prosecution's theory at trial was obvious from start to finish. In opening statement, trial counsel portrayed Appellant as threatening to kill SrA TLP "with the *goal* of literally striking fear into his victim." (R. at 163) (emphasis added). This was later bookended in closing argument, where trial counsel unequivocally posited that Appellant "communicated for the *purpose* of issuing a threat." (R. at 269) (emphasis added).

> sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992) (emphasis added).

There is nothing labyrinthine about the Article 115 specification in this case. It contains the required technical components and is upfront as to what was criminal about Appellant's conduct. Fair notice requires only that a person of "common intelligence," Davis, 139 S. Ct. at 2325, would "reasonably understand" what conduct is prohibited. Parker, 417 U.S. at 757. Appellant is certainly at liberty to claim that *he* did not understand what was prohibited. But while a criminal mind may know no limits, a reasonable mind does. The test is whether a person of common intelligence—*not* Appellant specifically—would reasonably understand that "wrongfully communicating a threat" required a less-than-innocent state of mind. Under this test, as discussed in Issue I, *infra*, the Article 115 specification survives "fair notice" scrutiny.

Finally, Appellant has not shown how such exhaustive notice would have benefitted him in this case. The record contains no indication that Appellant did not understand what this meant at trial—at no point did Appellant ask for a bill of particulars, which might have resulted in more of the specificity that he purports is required. Put differently, Appellant has failed to make a clear showing that omission of the words "for the purpose of issuing a threat" or "with knowledge that the communication will be viewed as a threat" substantially prejudiced his ability to defend against the charge at trial. As a result, Appellant's claim fails.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the conviction and sentence.

III.

APPELLANT'S CONVICTION FOR WRONGFULLY COMMUNICATING A THREAT IN VIOLATION OF ARTICLE 115, UCMJ, IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Issues of factual and legal sufficiency are reviewed de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law & Analysis

The test for a factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt." United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017). The test for legal sufficiency is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018). The legal sufficiency assessment "draw[s] *every* reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

Appellant alleges that his conviction is legally and factually insufficient "because the evidence does not establish the first and third elements for Article 15—the objective presence of a threat or subjective mens rea requirement for communication of the purported threat." (App. Br. at 19.) In so contending, Appellant relies on a skewed interpretation of the evidence that this Court should decline to adopt. As discussed below, "the evidence produced at trial" is both

legally and factually sufficient to affirm Appellant's conviction for wrongful communication of a threat. See id.

A. The evidence establishes that Appellant "communicated certain language expressing a present determination or intent to injure" SrA TLP.

According to Appellant, "the only witness to this charge, SrA TLP, did not establish that [Appellant] communicated a present threat to shoot him." (App. Br. at 20.) In support of this contention, Appellant points to (a) the two eyewitnesses who did not recall Appellant threatening SrA TLP, and (b) two "versions" of SrA TLP's testimony that purportedly contradict each other. (Id.) This characterization of the facts is inaccurate.

With respect to the eyewitnesses, A1C RL and A1C DW, it is important to note that neither affirmatively denied that Appellant threatened SrA TLP. Instead, both attested to being surprised when Appellant pulled out the firearm. (R. at 175, 193.) A1C RL testified that "[n]ot much" was going through his mind and that he "really can't remember" whether Appellant threatened to shoot SrA TLP. (R. at 175.) A1C DW recalled that there was "some kind of dialogue," but averred that he could not remember what it was because he was "in [ ] a shocked state." (R. at 194-95.) Based on these facts, it is reasonable for this Court to infer that A1C RL and A1C DW did not hear the threat because they were distracted by the sudden escalation of hostilities.

Moreover, A1C RL and A1C DW's inability to recall whether Appellant threatened SrA TLP is immaterial, since SrA TLP remembered and testified to it in detail. SrA TLP's direct examination produced evidence that (1) Appellant, while confronting SrA TLP, pulled out a firearm and "racked the slide"; (2) SrA TLP asked Appellant if he was going to shoot him; (3) Appellant said "yes"; and (4) SrA TLP then told Appellant to "go ahead and shoot [him]," in that order. (R. at 207-208.) On cross examination, trial defense counsel took painstaking care to

avoid questioning SrA TLP about the first, second, or third parts of the above sequence of events, and only elicited confirmation that SrA TLP told Appellant to shoot him. (R. at 213.) Thus, what Appellant portrays as two conflicting accounts from SrA TLP is actually Appellant taking SrA TLP's cross examination out of context and presenting it in a vacuum. Ultimately, how Appellant frames SrA TLP's testimony matters little, since SrA TLP's testimony was internally consistent and mostly corroborated by other witnesses—a fact that this Court can use to reasonably infer that SrA TLP testified truthfully.

Appellant also contends that his response to SrA TLP "does not objectively qualify as a threat" because "the communication in question … was [Appellant's] response to a question directly posed to him, consisting of one word – 'yes.'" (App. Br. at 20.) In Appellant's mind, "a mere affirmation to a question" does not qualify as an objective threat. (App. Br. at 20.)

Whether a communication constitutes a threat requires an objective inquiry that "analyz[es] the existence of a threat from the viewpoint of 'a reasonable person *in the recipient's place.*'" United States v. Harrington, 2023 CAAF LEXIS 577, *8-9 (C.A.A.F. 2023) (quoting United States v. Phillips, 42 M.J. 127, 130 (C.A.A.F. 1995) (emphasis in original)). This analysis requires examination of both the language of the communication and its surrounding context:

> The words communicated certainly matter because they are the starting point in analyzing a possible threat. But words are used in context. Divorcing them from their surroundings and their impact on the intended subject is illogical and unnatural. Legal analysis of a threat must take into account both the words used and the surrounding circumstances.

United States v. Brown, 65 M.J. 227, 231-232 (C.A.A.F. 2007).

Under this framework, the evidence—viewed in the light most favorable to the prosecution—and all reasonable inferences drawn therefrom establish beyond a reasonable doubt that Appellant's "yes" answer was objectively a threat.

If a person was confronted by three strangers in a parking lot late at night, and one stranger became dissatisfied with the person's answers to his questions and pulled out a firearm and cocked it as though he was loading ammunition into the chamber, the person being confronted would understandably fear for his life. If the person then asked the stranger with the firearm if he was going to shoot him, and the stranger said "yes," that person would likely understand that as a real threat to his personal safety. This is what it would look like to be a reasonable person in SrA TLP's place.

Considering the above, this Court should be unpersuaded by Appellant's suggestion that a threat requires "an affirmative statement from the declarant," rather than "a simple response to a question." (App. Br. at 21.) As our superior Court noted in Brown, the words used to communicate a threat are a "starting point," but "words are *used in context*." 65 M.J. at 231-232. By fixating on the *form* of the communication—a single-word response to a question—rather than what it *conveyed*, Appellant seeks to "divorce [his words] from their surroundings and their impact on the intended subject," which is "illogical and unnatural." Id. This Court should engage in a more nuanced examination, absent which "absurd results might arise, defeating both the text and purpose …of the Manual for Courts-Martial." Id. at 232.

Here, the importance of the context in which Appellant says "yes" to SrA TLP's question about shooting him cannot be understated. Appellant—accompanied by A1C RL and A1C DW—confronted SrA TLP in an outdoor parking lot late at night because Appellant was angry about a perceived wrong committed by SrA TLP. At the time of the altercation, SrA TLP and

Appellant were total strangers— SrA TLP had never seen Appellant, A1C RL, or A1C DW before the incident. After SrA TLP told Appellant he did not know what he was talking about, Appellant told SrA TLP he "better remember," pulled out a firearm, and "racked the slide." It is in this context that SrA TLP asked if Appellant was going to shoot him, and Appellant said "*yes*." Under these circumstances, any rational trier of fact would conclude that a reasonable person in SrA TLP's place would perceive Appellant's "yes" as a threat to injure him. *See* Harrington, 2023 CAAF LEXIS 577, *10 (finding that a reasonable person who knew the accused was in possession of a gun would perceive his declaration of an intent to kill as more threatening).

B. The Government presented sufficient evidence of Appellant's subjective intent and therefore established the third element beyond a reasonable doubt.

Part and parcel of Appellant's attack on the sufficiency of his conviction is his claim that the prosecution "failed to establish [Appellant's] subjective intent" (App. Br. at 21)—that is, evidence that Appellant said "yes" for the purpose of issuing a threat or with knowledge that SrA TLP would perceive it as such. Appellant contends that the evidence shows he was "on 'autopilot' when he answered to an escalating situation rather than actually intending to threaten SrA TLP," and that the requisite mens rea is lacking as a result.[11] (App. Br. at 21.) This proves unpersuasive for several reasons.

First, it was Appellant who initiated the situation to begin with by driving to SrA TLP's dorm room and luring him outside. Further, Appellant is the one who escalated the situation by pulling out and cocking a firearm. Moreover, directly contradicting Appellant's assertion that he

[11] Appellant also suggests that "SrA TLP's testimony described how [Appellant] automatically responded to a question posed directly to him … after SrA TLP essentially dared him to shoot him." (App. Br. at 21.) This is factually incorrect, since SrA TLP testified to asking Appellant if he was going to shoot, and only *after* Appellant said "yes" did SrA TLP tell him to "go ahead." (R. at 208.)

did not intend to threaten SrA TLP is the prosecution's evidence of Appellant's intent at the time—specifically, testimony about Appellant admitting he did it to "show force" and "make sure [SrA TLP] was scared." (R. at 251.) On this evidence alone, a rational factfinder could conclude that Appellant subjectively intended his messages to be perceived as threatening. This conclusion is further bolstered by the fact that Appellant was angry when he confronted SrA TLP and told SrA TLP he "better remember" (R. at 173) immediately before he whipped out a firearm and cocked it—which, again, illustrates the importance of the context in which words are uttered.

C. Conclusion

"[A]fter weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Rosario, 76 M.J. at 117. The evidence incontrovertibly establishes that Appellant brought a firearm to the altercation, "racked the slide to show force…and make sure [SrA TLP] was scared," and said "yes" when asked if he was going to shoot SrA TLP. Viewing this evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that (1) a reasonable person in SrA TLP's position would have perceived Appellant's "yes" as a threat, given the circumstances, and (2) Appellant intended for his words to be perceived as threatening. Accordingly, Appellant's conviction is legally and factually sufficient.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the conviction and sentence.

IV.

THE 326-DAY PERIOD BETWEEN PREFERRAL AND APPELLANT'S TRIAL DID NOT VIOLATE APPELLANT'S RIGHT TO SPEEDY TRIAL UNDER R.C.M. 707 OR THE SIXTH AMENDMENT.

Additional Facts

On 27 May 2021, Appellant's commander preferred charges against him for violations of Article 128, 131b, 107, and 115. (*Charge Sheet*, ROT, Vol. 1.) The same day, the special court-martial convening authority (SPCMCA) directed a preliminary hearing under Article 32, UCMJ, and appointed Maj BP as the preliminary hearing officer (PHO). (*Memorandum to Maj BP*, ROT, Vol 5.) The SPCMCA scheduled the hearing for 9 June 2021 and delegated to the PHO the authority to approve delays pursuant to R.C.M. 707. (Id.)

On 28 May 2021, Maj BP emailed counsel for the prosecution and defense, notifying them of his appointment as the PHO. (App. Ex. II at 25.) The same day, Appellant's trial defense counsel responded to Maj BP and requested a delay until 25 June 2021. (App. Ex. II at 24-25.) Noting that the prosecution's deadline for providing evidence had not passed, Maj BP asked trial defense counsel to renew his request for a delay—if he still needed it—once he had received and reviewed the evidence. (App. Ex. II at 24.)

On 2 June 2021, trial defense counsel renewed his request for a delay until 25 June 2021, citing the need for additional investigation. (App. Ex. II at 21.) Maj BP granted the delay. (Id.)

On 16 June 2021, trial defense counsel submitted a discovery request that included a request for speedy trial on behalf of Appellant. (App. Ex. XV at 35.)

At the preliminary hearing on 25 June 2021, trial defense counsel objected—for the first time—to Maj BP serving as the PHO due to his position as the Deputy Staff Judge Advocate at the prosecuting legal office and requested that he recuse himself. (*Preliminary Hearing Report*,

21 June 2021, ROT, Vol. 5.) Maj BP did not recuse himself and the hearing was completed the same day. (Id.) After the hearing, trial defense counsel did not submit any supplemental matters. (Id.) Maj BP published his preliminary hearing report within the prescribed time period and recommended that the charges and specifications be referred for trial by general court-martial, and the general court-martial convening authority (GCMCA) obliged. (*Preliminary Hearing Report*, 21 June 2021, ROT, Vol. 5; *Pretrial Allied Papers*, ROT, Vol. 4.)

At the time of docketing, the prosecution's ready date at the time was 20 September 2021, while the defense's ready date was 28 February 2022. (*Confirmation of Arraignment and Initial Trial Dates*, 16 September 2021, ROT, Vol. 5.) The defense ready date was based on the joint availability of Appellant's two trial defense counsel. (App. Ex. XIII at 1.) By agreement of the parties, the Chief Circuit Military Judge (CCMJ) set an "arraignment date" of 28 October 2021 and excluded the time period from 20 September 2021 to 27 October 2022 from speedy trial computation. (Id.)

On 28 October 2021, an Article 39(a) session was held, where Appellant was arraigned and called upon to enter pleas. (R. at 14.)

> MJ: The accused will now be arraigned.
>
> ATC: All parties to the trial have been furnished with a copy of the charges. Does the accused want them read?
>
> DC: Airman Pittman waives the reading of the charges.
>
> MJ: The reading may be omitted.
>
> ATC: The charges are signed by Lieutenant Colonel Javier Valasquez, a person subject to the code as accuser, are properly sworn to before a commissioned officer of the Armed Forces authorized to administer oaths, and are properly referred to this court for trial by Major General Michael J. Lutton, the Convening Authority.

> MJ: Accused and defense counsel, please rise. Senior Airman Terry L. Pittman, how do you plead?

(R. at 14-15.)

The military judge then received evidence and heard argument on a defense motion for appropriate relief requesting a new Article 32 hearing. (R. at 15-98; App. Ex. II.)

On 6 November 2021, the military judge granted the defense motion for appropriate relief and ordered that the Article 32 be re-accomplished. (App. Ex. IV.) The GCMCA subsequently withdrew—but did not dismiss—the charges and ordered a new preliminary hearing. (App. Ex. XV at 72, 78.) The second preliminary hearing was held on 21 December 2021, "the first date of mutual availability." (*Preliminary Hearing Report*, 21 December 2021, ROT, Vol. 4.) The charges examined at the second preliminary hearing were exactly the same as those examined at the first and resulted in the same recommendation—that they be referred for trial by general court-martial. (Id.)

On 6 January 2022, trial counsel submitted a request to the GCMCA asking for exclusion of time from 20 September 2021 to 27 February 2022 "[t]o account for the time during which defense counsel was not available for trial and the time needed for a new Article 32 preliminary hearing." (App. Ex. XV at 101-102.) The request further explained:

> The Government was originally ready to proceed with trial on 20 September 2021. Defense counsel was not available to proceed until 27 February 2022 [sic]. You should exclude the time between 20 September 2021 and 27 February 2022 *because it was time requested by defense counsel* and time necessary to ensure [Appellant] was available.

(App. Ex. XV at 102) (emphasis added).

After "careful consideration of the facts and circumstances," the GCMCA approved the request and excluded the time period from 20 September 2021 through 27 February 2022 pursuant to R.C.M. 707. (App. Ex. XV at 105.)

On 17 February 2022, the GCMCA re-referred the charges and specifications to trial by general court-martial. (*Charge Sheet*, ROT, Vol. 1.)

On 3 March 2022, in a memorandum titled "Confirmation of 'Initial Trial Date,'" the Air Force Trial Judiciary set the "initial trial date" for 18 April 2022 by agreement of the parties. (*Confirmation of Initial Trial Date,* 3 March 2022, ROT, Vol. 5.) The memorandum did not contain any reference to arraignment. (Id.) The prosecution's ready date at the time was 6 March 2022, while the defense's ready date was 18 April 2022. (Id.) By written memorandum, the Air Force's Chief Trial Judge excluded the period between the parties' ready dates—6 March 2022 to 17 April 2022—from speedy trial computation. (Id.)

Prior to the trial date, Appellant's trial defense counsel moved to dismiss the charges and specifications for a violation of Appellant's speedy trial rights under R.C.M. 707 and the Sixth Amendment. (App. Ex. XV.) Following the prosecution's response and additional briefing from both sides, the military judge denied the defense motion. (App. Ex. XIX.) The military judge found that Appellant "was brought to trial within the requirements of R.C.M. 707 at his original arraignment on 28 October 2021," and cited United States v. Cooper, 58 M.J. 54 (C.A.A.F. 2003) as informing her decision. (App. Ex. XIX at 7.) The military judge's reliance on Cooper was precipitated by the analogous situation therein, where a trial judge deemed the original Article 32 hearing defective *after* the accused had been arraigned, which ultimately resulted in a second Article 32 hearing and re-referral of the "initial charges." 58 M.J. at 55-56. The Court of Appeals for the Armed Forces found that the arraignment preceding the second Article 32 and re-referral of charges satisfied R.C.M. 707's 120-day speedy trial clock. Id. at 55. In a footnote to her analysis of Cooper, the military judge also stated that "[i]n the event any reviewing authority finds this Court's reliance on Cooper inapt, this Court further finds that the convening

authority was properly called on to exclude time in this case under R.C.M. 707." (App. Ex. XIX at 8, n.11.)

The military judge then evaluated the delay through the lens of the Barker v. Wingo, 407 U.S. 514, 522 (1972) factors. (App. Ex. XIX at 8.) In her analysis, the military judge "assum[ed] without deciding that reasons for delay and assertion of the speedy trial right weight ever so slight in favor of the accused." (Id.) Finding no violation of the Sixth Amendment, the military judge focused on the length of the delay—which she deemed was "not facially unreasonable"—and the absence of prejudice to Appellant. (Id.)

> [Appellant] has been able to have unfettered contact with his defense team, to prepare matters for his trial, to participate in the development of defense strategy, to provide inputs on his defense, *to obtain the relief he requested in a new Article 32 hearing*, take leave, and otherwise effectively participate in the preparation of his defense, despite the disputed delay.

(App. Ex. XIX at 9) (emphasis added).

A detailed speedy trial chronology is below:

Date	**Event(s)**	**Days Elapsed**	**Days Accountable**	
			If 28 Oct 21 arraignment is valid	If 28 Oct 21 arraignment is invalid
27 May 21	Preferral of charges; PHO appointed and Article 32 scheduled for 9 June 2021.	0	0	0
3 Jun 21	PHO grants defense request to delay Article 32 from 9 June 2021 to 25 June 2021.	7	7	7
9 Jun 21	**First day of PHO exclusion for Defense-requested delay (9-24 Jun 21; 16 days)**.	13	12	12
16 Jun 21	Appellant demands speedy trial.	20	12	12
24 Jun 21	Last day of Defense-requested delay.	28	12	12
25 Jun 21	Article 32 hearing held.	29	13	13
7 Jul 21	PHO report published.	41	25	25
30 Aug 21	Charges referred to general court-martial.	95	79	79
20 Sep 21	Prosecution ready date.	116	99	99

	First day of CCMJ's exclusion of time (20 Sep 21-27 Oct 21; 38 days). First day of 20 AF/CC's exclusion of time (20 Sep 21-27 Feb 22; 161 days).			
27 Oct 21	Last day of CCMJ's exclusion of time.	153	99	99
28 Oct 21	Arraignment and motions.	154	**100**	99
6 Nov 21	Military judge grants defense motion for relief and ordered new Article 32 hearing.	163	*[R.C.M. 707 clock stopped]*	99
19 Nov 21	Defense submits offer for plea agreement.			99
29 Nov 21	GCMCA withdraws charges, appoints new PHO, and orders new Article 32 hearing.	186		99
30 Nov 21	Newly appointed PHO schedules Article 32 hearing for 21 December 2021.	187		99
21 Dec 21	Second Article 32 hearing held.	208		99
29 Dec 21	Second PHO report published.	216		99
6 Jan 22	Trial counsel requests GCMCA exclude time from 20 September 2021 to 27 February 2022 (160 days).	224		99
7 Jan 22	GCMCA approves request for exclusion of time.	225		99
13 Jan 22	Second PHO report provided to defense.	231		99
17 Feb 22	Charges re-referred to general court-martial.	266		99
25 Feb 22	Convening ordered provided to defense.	274		99
27 Feb 22	Last day of 20 AF/CC's exclusion of time.	276		99
28 Feb 22	Re-referred charges served on Appellant.	277		100
3 Mar 22	Second Government ready date.	280		103
5 Mar 22	Last day of five-day statutory waiting period under Article 35(b), UCMJ.	282		105
6 Mar 22	First day of CTJ's exclusion of time.	283		105
17 Apr 22	Last day of CTJ's exclusion of time.	325		105
18 Apr 22	First day of Appellant's trial on the merits.	326		**106**

Standard of Review

A military judge's determination of whether an accused has received a speedy trial is reviewed de novo and with "substantial deference to the military judge's findings of fact," which will be reversed only if they are "clearly erroneous." United States v. Harrington, 81 M.J. 184, 189 (C.A.A.F. 2021). "A finding of fact is clearly erroneous when there is no evidence to

support the finding or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. (quotations omitted).

Law and Analysis

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" U.S. CONST. amend. VI. However, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Barker, 407 U.S at 522.

In the military, the speedy trial right flows from not only the Sixth Amendment, but also from R.C.M. 707.[12] Together, they provide a "sometimes overlapping framework" for the protection of an accused's speedy trial rights, which are triggered upon the preferral of charges or imposition of pretrial restraint. United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016).

When a speedy trial violation is alleged, an analysis under the Sixth Amendment focuses on the date of the triggering event and analyzes the alleged violation based on the factors set forth in Barker, 407 U.S. at 53: (1) the length of delay, (2) the reason for the delay, (3) the accused's assertion of his right, and (4) prejudice to the accused. Harrington, 81 M.J. at 189. An analysis under R.C.M. 707 examines whether an accused was "brought to trial" within 120 days of the triggering event, not counting delays of time properly excluded under the rule. "Arraignment 'stops' the speedy trial clock for purposes of R.C.M. 707 and trial stops the speedy trial clock for … the Sixth Amendment." Wilder, 75 M.J. at 138 (citations omitted).

[12] Article 10, UCMJ, is also a source of servicemembers' right to speedy trial; however, it is not at issue in this case and is therefore omitted from the discussion for the sake of brevity.

Here, Appellant alleges that the Government violated his rights to speedy trial under both R.C.M. 707 and the Sixth Amendment. As discussed further below, Appellant's claim fails because (a) Appellant was arraigned within 120 days of preferral in compliance with R.C.M. 707, and (b) the Barker factors weigh in favor of the Government, therefore there was no Sixth Amendment violation.

A. The Government did not exceed R.C.M. 707's 120-day mandate because the 28 October 2021 arraignment properly stopped the speedy trial clock; even if it did not, the convening authority properly excluded time under the rule.

With respect to his R.C.M. 707 claim, Appellant asserts that the military judge incorrectly found that (1) the 28 October 2021 stopped the speedy trial clock, and (2) in the alternative, the GCMCA's exclusion of time was proper. These assertions are without merit.

1. The military judge correctly found that the 28 October 2021 arraignment stopped the R.C.M. 707 speedy trial clock.

First, the military judge correctly found that Appellant was "brought to trial" within 120 days of preferral, as required by R.C.M. 707. "The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904." R.C.M. 707(b)(1). Pursuant to R.C.M. 904, arraignment consists of "reading the charges and specifications to the accused and calling on the accused to plead." Arraignment is complete once an accused has been called upon to plead—the entry of pleas is not part of the arraignment. R.C.M 904, Discussion. On 28 October 2021, trial counsel offered to read the charges—which Appellant waived—and the military judge called upon Appellant to plead. Thus, there is no question that the arraignment was technically proper. Further, the military judge's determination that this arraignment stopped the R.C.M. 707 clock—even though a new Article 32 hearing and re-referral of the same charges followed—correctly relied on the decision in Cooper. Id. at 55; *see also* United States v. Trujillo, NMCCA 200001732, 2005 CCA LEXIS 157 (N-M Ct. Crim. App. 16 May 2005)

(unpub. op.) (holding that accused's first arraignment stopped the R.C.M. 707 speedy trial clock even though charges were subsequently withdrawn and examined again at a second Article 32 hearing).

Appellant, for his part, alleges that the 8 October 2021 arraignment was a "legal nullity" that is distinguishable from that in Cooper. (App. Br. at 33.) In support of this contention, Appellant points to the fact a complete re-hearing was required in his case, whereas the Article 32 hearing in Cooper was "re-opened" by the same PHO to "correct limited errors." (App. Br. at 33.) Indeed, the Article 32 hearing in Cooper was defective for reasons that did not implicate the impartiality of the PHO, which allowed the original PHO to "re-open" the hearing. Id. at 54.

However, neither the PHO in Cooper nor the second PHO in Appellant's case considered new substantive matters—both considered the exact same charges that had initially been referred. *See* 58 M.J. at 56 ("No new substantive matters were presented by either side"); (*Preliminary Hearing Report*, 25 June 2021, ROT, Vol. 5, *cf. Preliminary Hearing Report*, 25 June 2021, ROT, Vol. 4.) In the grand scheme of things, the result was the same—in both cases, the second Article 32 resulted in the re-referral of the exact same charges, *after* an arraignment had already occurred. Thus, in terms of procedural posture as it related to R.C.M. 707, there was no meaningful difference between this case and Cooper.

Appellant has not provided a compelling explanation as to why this Court should deem "clearly erroneous" a determination that mirrors one expressly sanctioned by our superior Court. Id. at 55 ("The military judge ruled this arraignment satisfied the 120-day speedy trial clock of R.C.M. 707, and we agree."). The reason Appellant has failed to supply a colorable argument for ignoring Cooper is simple: there is none.

2. Even if this Court disagrees with the military judge's reliance on Cooper, she correctly found that the convening authority properly excluded time.

Prior to the re-referral of charges, the convening authority excluded—at trial counsel's request—the period from the original prosecution ready date (20 September 2021) to the last date of defense-driven delay preceding the original trial date (27 February 2022). (App. Ex. XV at 101-102.) In motions practice, Appellant's trial defense counsel contested the validity of the exclusion. (App. Ex. XVII at 2.)

Under R.C.M. 707(c), a convening authority may approve pretrial delays prior to referral, in which case such delays will be excluded from speedy trial computation under the rule. "The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge." R.C.M. 707(c)(1), Discussion. Reasons to grant a delay could include, among other things, "time to complete other proceedings related to the case"; "time requested by the defense"; or "additional time for other good cause." Id. When the grant of a delay under R.C.M. 707 is raised at trial, "the issue is not which party is responsible for the delay but whether the decision of the officer granting the delay was an abuse of discretion." United States v. Lazauskas, 62 M.J. 39, 41-42 (C.A.A.F. 2005). "[I]n the absence of an abuse of discretion by the officer granting the delay, there is no violation of R.C.M. 707." Id. at 42.

Here, the military judge examined the issue *arguendo* as an alternative basis for reaching her conclusion that no speedy trial violation occurred and found that the convening authority's exclusion of time was proper under R.C.M. 707. (App. Ex. XIX at 8, n.11.)[13] This finding is not clearly erroneous because if, as Appellant asserts, the 28 October 2021 arraignment was invalid

[13] "In the event any reviewing authority finds this Court's reliance on Cooper inapt, this Court further finds that the convening authority was properly called on to exclude time in this case under R.C.M. 707." (App. Ex. XIX at 8, n.11.)

due to the deficient Article 32 hearing, then it follows that the original referral—which was premised on recommendations from the first Article 32—was similarly void. In that scenario, the procedural posture would effectively reset to the pre-referral stage, where the convening authority can approve pretrial delay under R.C.M. 707. Here, the prosecution at the trial level *mistakenly* believed that the 28 October 2021 arraignment was invalid and asked the convening authority to exclude time as a result. In determining that the convening authority did not abuse his discretion, the military judge reasoned that the exclusion accounted for time needed to "re-accomplish the [Article 32] hearing and comply with the judge's order," which the military judge noted was "exactly the remedy requested by the defense." (Id.) This observation by the military judge illustrates that the convening authority's exclusion of time cannot be viewed in a vacuum—rather, it must be considered in tandem with the circumstances in this case. Regardless of when the new Article 32 was held, the defense would not have been available for trial until 28 February 2022 anyway, so the time period between 20 September 2021 and 27 February 2022 could be properly excluded.

Accordingly, the military judge's findings are reasonable, far from erroneous, and supports that no R.C.M. 707 violation occurred.

c. Appellant is not entitled to dismissal.

Because the military judge did not err in finding that the 28 October 2021 arraignment tolled the R.C.M. 707 clock—or that, in the alternative, the GCMCA properly excluded time—there is no speedy trial violation under R.C.M. 707. Accordingly, dismissal—which is an extreme remedy—is not an authorized remedy.

B. The 326-day period between preferral and trial did not violate Appellant's Sixth Amendment right to speedy trial.

Appellant also asserts that his Sixth Amendment right to speedy trial was violated by the 326-day period that elapsed between preferral of charges and the first day of his litigated trial. (App. Br. at 35.) The military judge considered this claim at the trial level, and after application of the Barker factors, found no violation of the Sixth Amendment. (App. Ex. XIX at 8-9.) As set forth below, the military judge's findings were supported in law and fact and therefore should be upheld.

1. The length of the delay was neither presumptively prejudicial nor unreasonable.

"The first factor, the length of delay, defines a *threshold* in the inquiry." United States v. Loud Hawk, 474 U.S. 302, 314 (1986). "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. Courts have found delays in excess of one year will trigger this inquiry. *See* Loud Hawk, 474 U.S. at 314 (finding a 90-month delay presumptively prejudicial); *see also* Harrington, 81 M.J. at 189 (finding a delay of more than 400 days "facially unreasonable" where the accused was charged with a single specification). However, as with many other determinations in the law, "[t]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Barker, 407 U.S. at 531-532.

The circumstances of this case reveal that the length of the delay was not unreasonable, given that the 326-day period consisted of: 38 days that the parties agreed to exclude during the initial docketing conference; another 122 days[14] that the defense would have been unavailable *even if* the original Article 32 had been proper; 6 days of additional Government delay

[14] This was calculated by counting 29 October 2021 (the day after arraignment) through 27 February 2022.

precipitated by the re-referral, service of charges, and the statutory waiting period; and finally, another 43 days of delay based on defense counsel's availability. Put differently, 203 of the 326-day period with which Appellant takes issue were agreed to—if not directly attributable to—Appellant and his counsel.

Appellant suggests that the 326-day period should weigh against the Government and cites United States v. Cooley, 75 M.J. 247, 259 (C.A.A.F. 2016) for the proposition that "[p]rior cases have established that similar time frames weighed against the Government." The Cooley court found that 289 days of pretrial confinement before trial on the charges for which the accused was originally confined was unreasonable under Article 10, UCMJ, because "no additional investigative action [on those charges] is reflected in the record." Id. Not only is this case distinguishable by the fact that Appellant was never in pretrial confinement, but unlike in Cooley, the record in this case reflects "additional investigative action." Although the charges did not change between the first and second referrals, they were investigated by a brand new preliminary hearing officer—which, lest anybody forget, was exactly what Appellant wanted. Thus, Appellant's comparison of his case to Cooley is inapt.

That there appears to be a lull at times does not mean the prosecution's processing of the case was unreasonably slow. "[C]onstant motion" is not required and "brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993).

Considering the "peculiar circumstances" of this case, the military judge correctly found that the length of delay was not presumptively prejudicial. Accordingly, it does not trigger a full-blown Barker inquiry. Nevertheless, the Government addresses the remaining factors *arguendo*.

2. The reasons for delay included defense counsel's unavailability and time needed to accomplish the relief that Appellant himself requested.

For many of the same reasons discussed above, the reasons for delay weigh in favor of the Government. To start, Appellant's trial defense counsel originally contemplated a delay between 20 September 2021 and 27 February 2022 based on *their* availability for trial. It is unchallenged that "because the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant." Vermont v. Brillon, 556 U.S. 81, 90-91 (2009) (quotations omitted). Appellant cannot represent that he will be ready for trial 161 days later than what the prosecution suggested and, in the same breath, fault the prosecution for not taking him to trial sooner.

While it is true that the prosecution ended up using that time to process Appellant's case, it bears remembering that the additional processing resulted directly from a favorable ruling on Appellant's motion for relief—namely, a new Article 32 hearing. As the military judge noted in her ruling, "this [was] exactly the remedy requested by the defense for a fair trial." (App. Ex. XIX at 8, n.11.) Thus, Appellant, "[h]aving sought the aid of the judicial process" to obtain his requested relief, cannot now "criticize the very process which [he] ... called upon." Loud Hawk, 474 U.S. at 316-317 (noting that a defendant whose trial was delayed by his interlocutory appeal should not be able to "reap the reward of dismissal" for failure to receive a speedy trial).

3. Though Appellant asserted his right to speedy trial prior to the referral of charges, the circumstances belie the genuineness of his request.

The third Barker factor considers whether an accused demanded speedy trial, and, arguably, the sincerity of that demand. As our superior Court has recognized, "[s]tratagems such as demanding a speedy trial now, when the defense knows the Government cannot possibly proceed, only to seek a continuance later, when the Government is ready, may belie the genuineness of the initial request." Kossman, 38 M.J. at 262 (citation omitted).

Such is the case here. Appellant—through his counsel's discovery request—demanded a speedy trial on 16 June 2021. However, before that demand was even made, Appellant's trial defense requested a delay of 16 days for the original Article 32 hearing. After the hearing, despite the original PHO denying the defense request that he recuse himself, the defense did not submit any supplemental information under R.C.M. 405(k)[15]—such as a written objection about the PHO's perceived lack of impartiality—to the convening authority for consideration. In the same vein, after receiving the Article 32 report, Appellant's trial defense opted not to lodge an objection with the convening authority under R.C.M. 405(l)(5).[16] Instead, Appellant waited until the case was docketed to file a motion requesting relief in the form of a new Article 32 hearing. At no point after the requested relief was granted did Appellant renew his demand for a speedy trial—the 16 June 2021 demand was his first and his last. By the time Appellant filed a motion to dismiss for violation of his speedy trial rights in March 2022, his trial defense counsel had twice represented to the central docketing office that they were unavailable for trial on the prosecution's proposed ready dates. Accordingly, this Court should view the genuineness of Appellant's demand for speedy trial with skepticism and find that this factor—if it favors Appellant at all—certainly does not outweigh the other factors that favor the Government.

[15] R.C.M. 405(k) provides that "[n]o later than 24 hours from the closure of the preliminary hearing, counsel for the Government, defense counsel, and any victim named in one of the specifications under consideration … may submit … additional information that the submitter deems relevant to the convening authority's disposition of the charges and specifications."

[16] R.C.M. 405(l)(5) provides that "[u]pon receipt of the report, the accused has 5 days to submit objections to the preliminary hearing officer … [who] will forward the objections to the convening authority as soon as practicable." A convening authority who receives an objection "may direct that the preliminary hearing be reopened or take other action, as appropriate." R.C.M. 405(m), Discussion.

4. There was no prejudice to Appellant.

Finally, the fourth factor—prejudice—weighs in favor of the Government. "A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause." Reed v. Farley, 512 U.S. 339, 353 (1994). Thus, prejudice is evaluated "in the light of the interests of defendants which the speedy trial right was designed to protect," which are: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. Barker, 407 U.S. at 532. Appellant's claim fails because he has utterly failed to make such a showing.

Here, there was no pretrial confinement, therefore the first criterion should require no analysis. However, Appellant alleges that his administrative hold "prevented him from seeking reassignment to join his son, and that he "could only visit sporadically when he had available leave and could afford travel costs." (App. Br. at 39.) At this point, it is worth noting that Appellant was allowed to take 48 days of leave spanning five different time periods between November 2021 and April 2022. (App. Ex. XVIII at 8.) Being allowed to take leave "when [he] had available leave" is the opposite of the "oppressive" pretrial restraint with which speedy trial protections are concerned.

Appellant further asserts that the delay and his separation from his son caused him anxiety and strain. (Id.) As the military judge rightly noted in her speedy trial ruling, "such concerns exist for all criminally accused." (App. Ex. XIX at 8.) However, speedy trial protections are designed to "*minimize"*—not eliminate—such anxiety. Barker, 407 U.S. at 532. If indeed Appellant was anxious and wanted an earlier trial, he certainly did not demand it.

Finally, Appellant contends that the delay impaired his defense against the charges, citing the witnesses' perceived inability to "accurately remember important details." (App. Br. at 38.)

This argument cuts against Appellant because "[d]elay is not an uncommon defense tactic." Barker, 407 U.S. at 521. While the Supreme Court has recognized that "there is prejudice if *defense* witnesses are unable to recall accurately events of the distant past," the same is not necessarily true of prosecution witnesses. Barker, 407 U.S. at 532 (emphasis added).

> As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Id. at 521.

Appellant did not put on a case-in-chief at trial and cannot now in good faith argue that he could have but for the delay in getting to trial. At no point has Appellant claimed that potential defense witnesses "became unavailable owing to the delay." Id. at 534. That is because aside from Appellant, there were only three other witnesses to the altercation, and all three testified in court. Their inability to remember details did not prejudice Appellant—if anything, it worked in his advantage. Accordingly, there was no prejudice to Appellant and therefore no Sixth Amendment Violation.

C. Conclusion

In finding that Appellant's rights to speedy trial under R.C.M. 707 and the Sixth Amendment were not violated, the military judge appropriately applied existing case law to the facts at hand. In line with Cooper, she correctly found that Appellant's 28 October 2021 arraignment tolled the R.C.M. 707 speedy trial clock—despite the subsequent Article 32 hearing and re-referral—because the charges had not changed. With respect to Appellant's Sixth Amendment claim, the military judge weighed the Barker factors and properly concluded that

there was no violation because the length of the delay was not unreasonable, and more importantly, there was no prejudice.

Accordingly, her findings should not be disturbed, and this Court should find that Appellant's speedy trial rights were not violated.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

CONCLUSION

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

[redacted]

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 October 2023.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Senior Airman (E-4) **TERRY L. PITTMAN, III** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY** Before Panel No 1 Case No. ACM 40298 Filed on: 23 October 2023

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 an enlargement of time to file a reply to the Government's answer. The Government submitted its answer on 23 October 2023, Pursuant to Rule 18(d), Appellant's reply to the Government's brief is due on 30 October 2023. Appellant requests that this Court allow him additional time to file his reply brief by 17 November 2023. This is Appellant's first enlargement of time to file his reply brief.

The record of trial was docketed with this Court on 5 October 2022. From the date of docketing to the present date, 383 days have elapsed. On the date requested, 4[illegible] have elapsed.[1]

GRANTED
26 OCT 2023

[1] A description of Appellant's charges and specifications is contained in Appellant's brief, submitted to this Court on 8 September 2023. The transcript is 341 pages. There are 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits. Appellant is not currently in confinement.

The basis for Appellant's request is that his lead counsel, Col Anthony Ortiz, will be unable to sufficiently review the Government's answer due to his professional commitments at the Department of Justice (DOJ) and personal commitments until 13 November 2023. Col Ortiz is not currently on military orders and is currently a full-time employee for DOJ. Col Ortiz has numerous professional obligations at DOJ, including submissions of potential substantive filings to district courts in the District of Columbia and Montana until 13 November 2023. Further, Col Ortiz currently has childcare obligations from 23 October until 28 October 2023 and personal leave scheduled on 26 October and from 1 November to 6 November 2023. Appellant wants to ensure Col Ortiz has adequate time to review the Government's lengthy, 44-page answer brief to draft an appropriately responsive reply. Given that the Government's answer addresses complex procedural, evidentiary and Constitutional issues, the requested deadline of 17 November 2023 will afford Col Ortiz sufficient time to accomplish these tasks. This is Col Ortiz's first priority for his Air Force docket.

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

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

Respectfully submitted,

[redacted]
ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 23 October 2023.

Respectfully submitted,

[redacted]
ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

25 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TERRY L. PITTMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40298 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the Government's Answer in this case.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40298**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Terry L. PITTMAN	)	**DOCKETING**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 2d day of November, 2023,

ORDERED:

The Record of Trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Senior Airman (E-4) **TERRY L. PITTMAN**, United States Air Force, *Appellant*	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40298 Filed on: 17 November 2023

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

Among other things, this case requires this Court to address novel and underdeveloped issues that have yet to be resolved in military law. First, this Court must determine to what extent *Counterman v. Colorado* has changed the military's charging landscape with respect to communication of a threat. The second is the effect that a nullified arraignment based on an invalid Article 32 hearing has on tolling the Rule for Courts-Martial (R.C.M.) 707 speedy trial clock.[1] But the Government's response glosses over these central questions. As outlined below, *Counterman* has demonstrated the gap in military law regarding subjective mens rea, and the Rules for Courts-Martial and case law demonstrate that SrA Pittman's right to speedy trial under R.C.M. 707 were violated when he was not "brought to trial" within the 326-day period from preferral to his valid arraignment.

[1] SrA Pittman stands on the remaining arguments contained in his brief submitted to this Court on 8 September 2023.

A. The Government's brief fails to recognize *Counterman*'s effect on the military's charging scheme

Regarding SrA Pittman's arguments relating to vagueness or the failure to state an offense, the Government gives short shrift to the Supreme Court's rationale in *Counterman*. Rather, the Government's response relies primarily on 1) the plain meaning of term "wrongfully"; 2) the President's non-binding explanation of "wrongful" in the *Manual for Courts-Martial (MCM)*[2]*;* and 3) its unsupported assertion that a reasonable person would understand that communication of a threat "required a less-than-innocent state of mind." *See* Govt's Br. at 6-18.

Contrary to the Government's argument, no source of military law has clearly addressed the level of mens rea required to prove subjective intent for communication of a threat. *Counterman* makes it clear that the differing levels of subjective mens rea—purposefully, knowingly, and recklessly—each require a different quantum of evidence the Government must produce at trial. *See* 143 S.Ct. 2106, 2117 (2023); App.'s Br. at 10-11*; see also Carmell v. Tex*, 529 U.S. 513, 547 (2000) (noting that the prosecutor must produce a quantum of evidence sufficient to convict as a matter of law). And to survive Constitutional scrutiny, Article 115 must provide some standards for its application to subjective mens rea, especially in light of the "stringent" test in cases involving speech. *United States v. Williams,* 553 U.S.

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

285, 304 (2008); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010). To hold otherwise would encourage arbitrary enforcement of Article 115 based on differing standards of "wrongfulness" applied to its statutory text.

But the Government fails to recognize that Article 115, as written, encourages such arbitrary enforcement by establishing differing interpretations of the term "wrongfulness." Contrary to the its assurances that that statutory text of Article 115 is self-explanatory, the Government fails to address why the term "wrongful" has, in fact, been subject to different interpretations. In the 2016 *MCM,* the predecessor to Article 115—communication of a threat under Article 134—contained the same element that "the communication was wrongful." *See MCM* (2016 Ed.). Pt. IV, ¶ 110.b. Yet, the President's explanatory paragraph in the 2016 *MCM* included an additional basis for establishing wrongfulness that is absent from the 2019 *MCM*: whether the accused "acted recklessly with regard to whether the communication would be viewed as a threat." *Id*. ¶ 110.c The question therefore is apparent— if the term "wrongful" is clear on its face, then why has it been interpreted differently in the *MCM*?

Thus, the Government's assertion that "the statute's use of the term 'wrongfully' is dispositive on this point" or that the explanation in the *MCM*'s non-binding guidance "unequivocally sets forth the states of mind" required for conviction is not supported. Govt's Brief at 10-11. As described above, "wrongful" has multiple meanings and the extent that a "wrongful threat" has been defined in military law is hazy at best. What is clear is that *Counterman* has introduced a

new concept to the application of subjective mens rea that has never been addressed in the *MCM* or in the military's jurisprudence.

As such, it is incumbent upon this Court to address the level of mens rea needed to establish subjective mens rea under Article 115. The Government's dismissal of *Counterman* is short-sighted — the **level** of mens rea is an essential component to protecting an accused from arbitrary and discriminatory enforcement and necessary to inform an accused of the legal theory of which he or she may be convicted.

B. Neither the arraignment nor the convening authority's after-the-fact exclusion of time tolled the speedy trial clock under R.C.M. 707.

As previously described, the military judge clearly erred when she determined that the arraignment tolled the R.C.M. 707 speedy trial clock and, alternatively, that the convening authority properly excluded time under R.C.M. 707. App.'s Br. at 29-35. Initially, SrA Pittman's R.C.M. 707's speedy trial clock did not stop at the invalid 28 October 2021 arraignment. *See id.* at 30-33.

The Rules for Courts-Martial make it clear that, for an arraignment to toll the speedy trial clock, charges must be properly referred to the court. R.C.M. 707(a) requires that an accused shall be "brought to trial," such as an arraignment, within 120 days of a triggering event. Arraignment under R.C.M. 904 must be in a court-martial session, which the Discussion to the rule says should be an Article 39(a) session. Article 39(a), UCMJ, provides that sessions, including an arraignment, can only be conducted "after the service of charges which have been referred for trial…."

And R.C.M. 601(d)(2) dictates that that the convening authority may not refer a specification under a charge to a general court-martial unless there is "substantial compliance with the preliminary hearing requirements of R.C.M. 405." Because the military judge explicitly ruled that "the preliminary hearing was not in substantial compliance with Article 32 and RCM 405" SrA Pittman was not arraigned on properly referred charges on 28 October 2021. App. Ex. IV. at 14. Thus, this arraignment did not meet the requirement that SrA Pittman was "brought to trial" for the purposes of R.C.M. 707(a).

But the Government's brief incorrectly relies on two tenuous bases to argue that it complied with R.C.M. 707's 120-day clock within the 326-day gap between preferral and trial. The first is that *United States v. Cooper* stands for the proposition that a subsequent Article 32 hearing and re-preferral can validate an arraignment that is based on an invalid Article 32 hearing. Again, the **holding** of the case relates to Article 10 and none of the granted issues related to the tolling of the R.C.M. 707 clock. *See* 58 M.J. 54, 57 (C.A.A.F. 2003). And the Government fails to cite to any other case or any provision in the *MCM* that holds that a defective arraignment can somehow be made effective based on subsequent events. Indeed, such a holding would not make sense. An arraignment is more than a pro forma act but rather an event that triggers protections of an accused's rights. *United States v. Doty*, 51 M.J. 464, 465-66 (C.A.A.F. 1999). Thus, the Government's argument lays upon the slender reed of *Cooper*'s inapplicable holding.

Second, the military judge made limited findings regarding the convening authority's exclusion of time and ignored the prevailing case law in viewing the after-the-fact exclusion of time by the convening authority. The Court of Appeals for the Armed Forces has provided a lens for which to view such "after-the-fact" determinations, and the military judge did not address the main questions of whether the Government's delays in providing SrA Pittman with an unbiased Article 32 hearing or its last-minute attempt to exclude time complied with R.C.M. 707. *See*, *e.g.***,** *United States v. Hendrix*, 77 M.J. 454 (C.A.A.F. 2018). Moreover, the military judge failed to acknowledge or address the convening authority's complete lack of rationale for granting the exclusion: "After careful consideration of the facts and circumstances of this case, I approve your request to exclude the time from 20 September 2021 through 27 February 2022 in accordance with R.C.M. 707." App. Ex. XV at 105. As such, the military judge's footnote regarding the propriety of the convening authority's exclusion should be given no weight.

In sum, SrA Pittman's case requires this Court to explore these gaps in military law. The record of trial reflects a series of errors throughout SrA Pittman's case including the Government's charging decisions, the timely processing of SrA Pittman's case, and the sufficiency of the evidence at trial. Accordingly, SrA Pittman adopts the arguments and relief requested in his brief submitted on 8 September 2023.

Respectfully submitted,

[redacted]

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial & Appellate Operations Division on 17 November 2023.

Respectfully submitted,

[redacted]

ANTHONY D. ORTIZ, Col, USAFR
Appellate Defense Counsel
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