IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)	No. ACM 40371 27 December 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 **3 March 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 54 days[1] 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.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

[1] This EOT is being filed on 27 December 2022 based upon the Court's closure for

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 December 2022.

Respectfully submitted,

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

27 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40371 24 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 **2 April 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ).[2] R. at 366. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew of" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; ROT, Vol. 1, Entry of Judgment, dated 28 July 2022.

confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT, Vol. 1, Decision on Action, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for Appellant's dependent child. *Id.*

The record of trial consists of 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Appellant is 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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

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 February 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
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 February 2023.

OLIVIA B. HOFF, 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*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)	No. ACM 40371 22 March 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 to withdraw his previously filed motion, dated 22 March 2023, as counsel mistakenly noted that 150 days had elapsed instead of 180 days. This EOT has been updated to correct the days elapsed. Appellant requests an enlargement for a period of 30 days, which will end on **2 May 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ).[2] R. at 366.

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew of" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; ROT, Vol. 1, Entry of Judgment, dated 28 July 2022.

A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT, Vol. 1, Decision on Action, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for Appellant's dependent child. *Id.*

The record of trial consists of 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Appellant is 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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

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 March 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

23 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
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 23 March 2023.

OLIVIA B. HOFF, 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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FOURTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40371
JAMES L. TAYLOR JR.,	)	
United States Air Force	)	25 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) 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 June 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ).[2] R. at 366. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.
[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew of" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; ROT, Vol. 1, Entry of Judgment, dated 28 July 2022.

confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT, Vol. 1, Decision on Action, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for Appellant's dependent child. *Id.*

The record of trial consists of 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] 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 seventh priority[5] 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.

---

[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] Since the filing of Appellant's last EOT, counsel filed a reply brief in *United States v. Jones*, ACM 40226, on 18 April 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. Kitchen*, ACM 40155, on 20 April 2023.

[5] Counsel will also be filing a reply brief in *United States v. Flores*, ACM S32728, due 27 April 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 will begin reviewing the transcript once she files Appellant's brief in *United States v. Robles*.

4. *United States v. Shanor*, ACM 40359 - The record of trial is 4 volumes; the trial transcript is 159 pages. There are 4 prosecution exhibits, 0 defense exhibits, and 15 appellate exhibits. Counsel has reviewed Appellant's ROT and will be consulting with Appellant on issues to raise.

5. *United States v. Irvin*, ACM 40311 - The record of trial is 4 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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

26 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
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 26 April 2023.

OLIVIA B. HOFF, 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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIFTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40371
JAMES L. TAYLOR JR.,	)	
United States Air Force	)	25 May 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 **1 July 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ).[2] R. at 366. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew of" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; ROT, Vol. 1, Entry of Judgment, dated 28 July 2022.

confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT, Vol. 1, Decision on Action, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for Appellant's dependent child. *Id.*

The record of trial consists of 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] 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 fifth 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.

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[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] Since the filing of Appellant's last EOT, counsel filed a reply brief in *United States v. Flores*, ACM S32728 on 26 April 2023, 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.

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.

4. *United States v. Pittman*, ACM 40298 - The record of trial is 6 volumes; the trial transcript is 341 pages. There are 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits. Counsel has not yet begun reviewing 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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

31 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
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 31 May 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James L. TAYLOR, JR.	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 1st day of June, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **1 July 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

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. 2
Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)	No. ACM 40371 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 **31 July 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ).[2] R. at 366. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew of" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; ROT, Vol. 1, Entry of Judgment, dated 28 July 2022.

confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT, Vol. 1, Decision on Action, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for Appellant's dependent child. *Id.*

The record of trial consists of 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Appellant is 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[4] and has yet to complete her review of Appellant's case. Counsel is currently assigned 21 cases; 8 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 is drafting Appellant's Assignments of Error to submit on 28 June 2023.

---

[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] Since the filing of Appellant's last EOT, counsel was off f

Counsel was also off

.

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.

3. *United States v. Pittman*, ACM 40298 - The record of trial is 6 volumes; the trial transcript is 341 pages. There are 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits. Counsel has begun reviewing 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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

22 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
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 22 June 2023.

OLIVIA B. HOFF, 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. Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM 40371 24 July 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 **30 August 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ).[2] R. at 366. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew of" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; ROT, Vol. 1, Entry of Judgment, dated 28 July 2022.

confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT, Vol. 1, Decision on Action, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for Appellant's dependent child. *Id.*

The record of trial consists of 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Appellant is 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[4] 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 military counsel's second priority case. The following case has priority over the present case:

1. *United States v. Pittman*, ACM 40298 - The record of trial is 6 volumes; the trial transcript is 341 pages. There are 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits. Counsel has reviewed approximately half of Appellant's transcript.

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[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] 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 , and on leave from .

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,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 July 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

26 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 will have 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. 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 26 July 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James L. TAYLOR, Jr.	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 24 July 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) 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 26th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **30 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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 2 No. ACM 40371 23 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 (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 September 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

After Appellant's last motion for an enlargement of time, undersigned appellate defense counsel was detailed to this case on due to the permanent change of station of Appellant's previous appellate defense counsel, Maj Jenna Arroyo, effective . Additional time is necessary for undersigned counsel to familiarize himself with the case in order to competently advise Appellant. A motion to withdraw from Maj Arroyo is expected to be forthcoming.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB),

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022 (EOJ). The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396; EOJ. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt James L. Taylor Jr.*, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for the benefit of Appellant's dependent child. *Id.*

The record of trial is six volumes consisting of six prosecution exhibits, 12 defense exhibits, one court exhibit, and 36 appellate exhibits; the transcript is 396 pages. Appellant is currently confined. Undersigned counsel has reviewed approximately two-thirds of the record of trial in this case, excluding sealed portions of the record.[4]

Counsel is currently representing 27 clients; ten clients are pending initial AOEs before this Court. One case has priority over this case:

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[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew or" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022.

[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] A consent motion to examine sealed materials is being filed concurrently with this motion.

1) *United States v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel is preparing to present oral argument in this case to the U.S. Court of Appeals for the Armed Forces on 25 October 2023.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant is aware of his right to timely appeal, was consulted with regard to enlargements of time, and has consented to necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

25 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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.

PETE FERRELL, Lt Col, USAF
Director of Operations
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 25 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
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*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JAMES L. TAYLOR JR.,** United States Air Force *Appellant*	)	No. ACM 40371 23 August 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Appellate Exhibits XII–XV and pages 39–49 of the transcript in the Record of Trial (ROT).

Facts

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022 (EOJ).

In the course of the proceedings, trial defense counsel filed a motion to admit evidence pursuant to Military Rule of Evidence (MRE) 412, and the trial counsel and victim's counsel

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew or" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022.

subsequently filed responses. ROT Vol. 1, Exhibit Index. The military judge heard arguments on this motion during a closed Article 39(a), UCMJ, session and issued a written ruling. *Id.*; R. at 37–38. The military judge also ordered the filings related to this motion, which consist of Appellate Exhibits XII–XV, be sealed. R. at 27; App. Ex. XXI.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[3] perform "reasonable diligence,"[4] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[5] These requirements are consistent with those imposed by the state bar to which counsel belongs.[6]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ,

[3] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[4] *Id*. at Rule 1.3.
[5] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[6] Counsel of record is licensed to practice law in Georgia.

10 U.S.C. § 866. Appellate defense counsel so detailed by The Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

Each of the sealed exhibits is an appellate exhibit which was "presented" and "reviewed" by the parties at trial. Similarly, the sealed portions of the transcript record proceedings in which the parties participated. It is reasonably necessary for Appellant's counsel to review these sealed materials for counsel to competently conduct a professional evaluation of Appellant's case and uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ duties, and because the materials were available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of these sealed materials and has shown good cause to grant this motion.

The Government consents to both parties examining the sealed materials detailed above.

(Continued on next page)

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 August 2023.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James L. TAYLOR	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 21 August 2023, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Appellate Exhibits XII–XV and transcript pages 39–49 of the record of trial. Trial and defense counsel, as well as the military judge, were present during the relevant portion of the hearing and reviewed the exhibits.

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

The court's review of the record indicates that none of the requested exhibits were viewed solely *in camera*. Additionally, the court finds Appellant has made a colorable showing that review of the sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 25th day of August, 2023,

ORDERED:

Appellant's Consent Motion to Examine Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits XII–XV and transcript pages 39–49**, subject to the following conditions:

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

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR WITHDRAWAL OF**
Appellee,	)	**APPELLATE DEFENSE COUNSEL**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5),	)	No. ACM 40371
JAMES L. TAYLOR JR.,	)	
United States Air Force,	)	12 September 2023
Appellant.	)	

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to the Deputy Staff Judge Advocate position for the

Undersigned counsel's primary duties in her new assignment do not afford sufficient time for continued competent representation of Appellant. Major Frederick Johnson has been detailed substitute counsel in undersigned counsel's stead and made his notice of appearance on 23 August 2023. A thorough turnover of the record between counsel has been completed.

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

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Deputy Staff Judge Advocate
Office of Special Investigations, Judge Advocate Directorate
Department of the Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 September 2023.

Respectfully Submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO ATTACH**
Appellee,	)	
	)	Before Panel No. 2
v.	)	
	)	No. ACM 40371
Staff Sergeant (E-5)	)	
JAMES L. TAYLOR, JR.	)	
United States Air Force	)	
Appellant	)	14 September 2023

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to attach the Appendix to this motion to Appellant's Record of Trial. The Appendix may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals one (1) page in length and consists of the following:

Declaration of SSgt James L. Taylor, Jr.: A Declaration made under penalty of perjury and signed by SSgt Taylor. This declaration is relevant and necessary to resolving SSgt Taylor's motion to compel post-trial discovery and, ultimately, the question of personal jurisdiction. In determining whether appellate inquiry is warranted, this Court is required to consider, *inter alia*, "whether the defense has made a colorable showing that the evidence or information exists." *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). In his Declaration, SSgt Taylor describes a

series of post-conviction events which provide reason to believe evidence concerning his military status arose during the lengthy process of transferring him between confinement facilities. This, in turn, affects consideration of the court-martial's jurisdiction over SSgt Taylor, an issue raised by materials in the record. App. Ex. X; R. at 14–15.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion to attach.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

Appendix

1. Declaration of SSgt James L. Taylor, Jr., dated 8 September 2023, 1 page.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (NINTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40371
JAMES L. TAYLOR, JR.,	)	
United States Air Force	)	22 September 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 (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 October 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022 (EOJ). The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew or" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022.

be confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396; EOJ. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt James L. Taylor Jr.*, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for the benefit of Appellant's dependent child. *Id.*

The record of trial is six volumes consisting of six prosecution exhibits, 12 defense exhibits, one court exhibit, and 36 appellate exhibits; the transcript is 396 pages. Appellant is currently confined. Undersigned counsel has reviewed approximately two-thirds of the record of trial in this case, excluding sealed portions of the record,[4] and recently filed a motion to compel production of post-trial discovery, which is pending before this Court.

Counsel is currently representing 24 clients; 13 clients are pending initial AOEs before this Court.[5] One case has priority over this case:

1) *United States v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel is preparing to

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[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] This Court granted Appellant's consent motion to examine sealed materials.

[5] Since the filing of Appellant's last request for an enlargement of time, counsel filed a motion to compel production of post-trial discovery in this case, completed his review of the two-volume record and began drafting the AOE in *U.S. v. Ollison*, ACM S32745, and filed a motion for reconsideration in *U.S v. Gonzalez Hernandez*, ACM S32732. Additionally, counsel attended the Joint Appellate Advocacy Training on , was off , and was on leave on .

present oral argument in this case to the U.S. Court of Appeals for the Armed Forces on 25 October 2023.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant is aware of his right to timely appeal, was consulted with regard to enlargements of time, and concurs with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 September 2023.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

26 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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.

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

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

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 26 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
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. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.** United States Air Force, *Appellant*.	**MOTION TO COMPEL PRODUCTION OF POST-TRIAL DISCOVERY** Before Panel No. 2 No. ACM 40371 14 September 2023

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) James L. Taylor, Jr., hereby requests that this Court order production of the following discoverable evidence:

(1) all documents and communications related to SSgt Taylor's military status from the time of his court-martial (27–29 June 2022) to his transfer to the Naval Consolidated Brig Charleston (February 2023), and

(2) all documents and communications from June 2022 to February 2023 related to SSgt Taylor's transfer of confinement from Davis-Monthan Air Force Base (AFB) to the Naval Consolidated Brig Charleston.

Facts

SSgt Taylor is a reservist. Appellate Exhibit (App. Ex.) X, dated 28 February 2022.[1] On 20 October 2021, the Government charged SSgt Taylor with one specification of sexual assault and two specifications of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.SC. § 920. At trial, his counsel moved to dismiss his charges based on lack of personal jurisdiction. *Id*. Orally, his defense counsel argued that SSgt Taylor had not

[1] Appellate Exhibit X is entitled, "Defense Motion to Dismiss: Speedy Trial and Personal Jurisdiction."

been properly placed on active duty for the court-martial. R. at 14–15. Although the government provided a memo from the General Court-Martial Convening Authority (GCMCA) ordering SSgt Taylor's involuntary recall to active duty, his defense counsel specifically argued that nothing had been done to execute this order. *Id.* After denying the motion to dismiss, the military judge convicted SSgt Taylor, contrary to his pleas, of one specification of sexual assault and one specification of abusive sexual contact. R. at 366. The military judge then sentenced him to a reprimand, reduction to the grade of E-1, confinement for 19 months, and a dishonorable discharge, signing the Statement of Trial Results, which was subsequently distributed to defense counsel, on 29 June 2022. R. at 396; Statement of Trial Results dated 29 June 2022 (STR).

Following his conviction and sentencing in June 2022, SSgt Taylor was confined at Davis-Monthan AFB. Declaration of 8 Sep. 2023. Over the next seven months, his scheduled transfer to the Naval Consolidated Brig Charleston was canceled four times. *Id.* SSgt Taylor was repeatedly told these cancellations were due to issues with his status as a reservist. *Id.* In particular, SSgt Taylor was told in October 2022 that he was not in the active-duty system and not on active-duty orders, resulting in the cancellation of his transfer. *Id.* He also received indications that these issues were being addressed by offices at higher levels. *Id.* He was finally transferred to the Naval Consolidated Brig Charleston in February 2023. *Id.*

Law and Analysis

Appellate inquiry into the jurisdiction of the court-martial over SSgt Taylor is warranted because post-trial events have given rise to new reasons to question his military status at the time of trial. *See* Declaration of 8 Sep. 2023. In *United States v. Campbell*, the Court of Appeals for the Armed Forces (CAAF) held that when resolving a post-trial discovery dispute relevant to an appeal, appellate courts "must determine whether the appellant met his threshold burden of

demonstrating that some measure of appellate inquiry is warranted." *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). To address this question, the CAAF provided four factors to consider, among other things:

> (1) whether the defense has made a colorable showing that the evidence or information exists;
>
> (2) whether or not the evidence or information sought was previously discoverable with due diligence;
>
> (3) whether the putative information is relevant to appellant's asserted claim or defense; and
>
> (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id. If this Court decides that post-trial discovery is appropriate, "it has discretion . . . to determine how additional evidence, when required, will be obtained, *e.g.*, by affidavits, interrogatories, or a fact-finding hearing." *Id.* An evaluation of the four *Campbell* factors leads to the conclusion that post-trial production of the requested documents is necessary and appropriate. With respect to the *Campbell* factors:

(1) Existence of the Evidence. SSgt Taylor was supposed to be transferred from Davis-Monthan AFB to the Naval Consolidated Brig Charleston several times between June 2022 and February 2023. Declaration of 8 Sep. 2023. However, he was not transferred for over seven months, and he was repeatedly told that he was not being transferred due to issues relating to his orders and reserve status. *Id.* Moreover, SSgt Taylor received repeated indications that these issues were being worked and elevated between various offices, *id.*, processes which would inevitably generate the documents sought. SSgt Taylor's prior counsel spoke with Appellant's commanding officer, Lt Col W.L., who indicated that she would turn over the requested documents

if she was told to turn them over, implying that the requested documents exist. As such, SSgt Taylor has made a reasonable showing that the evidence sought exists.

(2) Previously Discoverable. SSgt Taylor's trial defense counsel filed a motion to dismiss for lack of personal jurisdiction, arguing the court-martial did not have jurisdiction over appellant. App. Ex. X. However, documents concerning his transfer and related issues with his military status were not previously discoverable because they could not have existed until these issues arose after pronouncement of the sentence. While evidence presented in motions practice indicated issues with SSgt Taylor's status before trial, *see* App. Ex. X, the evidence of post-trial problems would tend to show that these issues were not properly resolved. Additionally, the issues concerning SSgt Taylor's transfer arose after the time to file post-trial motions had passed. Post-trial motions must be filed not later than 14 days after defense counsel receives the Statement of Trial Results, although this can be extended by not more than an additional 30 days for good cause. Rule for Courts-Martial (R.C.M.) 1104(b)(2)(A). The military judge in this case signed the Statement of Trial Results, which was then distributed to defense counsel, on 29 June 2022, approximately two months before the first cancellation of SSgt Taylor's transfer. STR; Declaration of 8 Sep. 2023.

(3) Relevance. SSgt Taylor raised the issue of lack of personal jurisdiction, both at the time of the alleged offenses and at the time of trial. App. Ex. X; R. at 14–15. The military judge denied Appellant's motion, finding the court-martial had jurisdiction over Appellant. App. Ex. XXIX. The post-trial events surrounding his transfer provide reason to question this ruling, and the documents sought are relevant to clarify his status throughout the court-martial process. He was repeatedly told he could not be transferred because he was not in an active-duty status and did not have orders for over seven months. Declaration of 8 Sep. 2023. The evidence establishing

this is highly probative as to whether the order to recall him to active duty was properly executed, which in turn is probative on the question of jurisdiction. Moreover, challenges to jurisdiction are not waivable and can be brought at any time, including on appeal. R.C.M. 907(b)(1); *United States v. Alton*, No. ACM 40215, 2023 CCA LEXIS 184, at *11 (A.F. Ct. Crim. App. Apr. 28, 2023) (unpub. op.). These documents are relevant to SSgt Taylor's jurisdiction claim and will be used to support his argument that the court-martial did not have jurisdiction to try him for the alleged offenses. Further, these documents will aid this Court in exercising its Article 66, UCMJ, 10 U.S.C. § 866, responsibility to approve only findings and sentence that are correct in law; a void proceeding certainly fails this standard.

(4) Reasonable Probability of a Different Result. Considering the statements made to SSgt Taylor regarding the repeated cancellations of his transfer, Declaration of 8 Sep. 2023, it is reasonably probable the materials sought will describe problems with SSgt Taylor's active-duty status following trial in this case. This, in turn, would tend to show he was not properly recalled to active duty for the court-martial to have jurisdiction over him at the time of trial, contrary to the military judge's ruling. The findings of a court-martial without jurisdiction are void. *United States v. Carter*, No. ACM 38708, 2016 CCA LEXIS 432, at *18 n.23 (A.F. Ct. Crim. App. July 21, 2016) (unpub. op.) (citing *United States v. Henderson*, 59 M.J. 350, 352-54 (C.A.A.F. 2004)). If SSgt Taylor was not in the proper military status conveying jurisdiction, the findings of the court-martial, including those on which its judgment against SSgt Taylor was based, would be void. This would clearly constitute a different result.

WHEREFORE, SSgt Taylor respectfully requests this Honorable Court grant his motion to compel the production of post-trial discovery. Recognizing that it is in the Court's discretion to determine how additional evidence is obtained, *Campbell*, 57 M.J. at 138, SSgt Taylor specifically

requests the production of documents in the hopes that additional proceedings (i.e., a *Dubay* hearing) will not be necessary.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.** United States Air Force *Appellant.*	)))))))))	**OPPOSITION TO MOTION TO COMPEL DISCOVERY** Before Panel No. 2 No. ACM 40371 20 September 2023

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court to deny Appellant's Motion to Compel Discovery because Appellant has failed to meet the stringent standard for post-trial appellate discovery articulated by the United States Court of Appeals for the Armed Forces in United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2002).

Opposition to Motion to Compel

Over a year after Appellant was tried and convicted by a general court-martial composed of a military judge sitting alone, he now asks this Court to compel production of (1) all documents and communications related to SSgt Taylor's military status from the time of his court-martial (27-29 June) to his transfer to the Naval consolidated Brig Charleston (February 2023); and (2) all documents and communications from June 2022 to February 2023 related to SSgt Taylor's transfer of confinement from Davis-Monthan Air Force Base (AFB) to the Naval Consolidated Brig Charleston. (App. Mot. at 1.)

A military accused enjoys a statutory right (as implemented by rules promulgated by the President) to review discovery in the possession of the prosecution and to obtain favorable

evidence in preparation for ***trial***. Article 46, UCMJ; R.C.M. 701. Indeed, the military has a well-settled liberal pretrial discovery practice. United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004). This liberal pretrial discovery is broader than federal civilian criminal proceedings and is designed to eliminate pretrial gamesmanship, reduce pretrial motions practice, and reduce the potential for surprise and delay at trial. United States v. Jackson, 59 M.J. 330, 333 (C.A.A.F. 2004). It is expected that trial defense counsel exercise due diligence in pretrial preparations and requests for discovery. *See* Campbell, 57 M.J. at 138. However, the standard for evaluating whether discovery should be ordered in a case that is on a post-trial appeal is completely different from a case that is still in a pretrial stage. Id. The trial is over and so is Appellant's opportunity to embark on a fishing expedition.

As discussed in Campbell, "when faced with a post-trial dispute over discovery ***relevant*** to an appeal," appellate courts should consider, among other things, four factors: (1) whether the defense has made a colorable showing that the evidence or information exists; (2) whether or not the evidence or information sought was previously discoverable with due diligence; (3) whether the putative information is relevant to an appellant's asserted claim or defense; and (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed. 57 M.J. at 138 (emphasis added).

1. The Campbell factors do not weigh in favor of Appellant's request for all documents and communications related to his military status from the time of his court-martial to his transfer to Naval Consolidated Brig Charleston.

Appellant has failed to meet his burden to justify appellate discovery of the requested information. First, Appellant has failed to demonstrate the relevance of a substantial portion of the requested information. It appears from Appellant's motion the underlying claim he is attempting to make is the military judge erred by denying his motion to dismiss for lack of

personal jurisdiction. (App. Mot. at 5.) The relevant portion of time is whether the court-martial had jurisdiction at the time of the court-martial. Next, Appellant requests all communications related to his military status, but there's no evidence in his declaration or underlying motion that any such emails or other forms of communication exist. It is noteworthy Appellant can't point to a particular party who may have sent such communications. The fact Appellant is unable to do so demonstrates Appellant is not sure these communications exist or who may have sent them or what form they may be in.

Given the relevant portion of information for Appellant's claim is his military status on the dates of his court-martial and in the lead up to said court-martial, Appellant fails the second Campbell factor. Reasonable due diligence by trial defense counsel would have presumably uncovered any and all documentation related to Appellant's recall to active duty. Given that lack of personal jurisdiction is an issue that would render a court-martial invalid, due diligence by trial defense counsel would demand they adequately investigate in order to file a motion for lack of personal jurisdiction. Based on the fact trial defense counsel filed a motion to dismiss for lack of personal jurisdiction, it's clear they did not overlook the issue. The portion of the requested evidence that would be relevant to a claim of lack of personal jurisdiction at the time of the court-martial should have been discovered as part of due diligence in trial defense counsel's case preparation and investigation in support of their motion to dismiss.

Further, Appellant has failed to meet his burden to demonstrate a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed. Appellant has not demonstrated what the requested information will reveal about his military duty status. He has in no way shown that it will contain evidence that he was not properly recalled to active duty for his court-martial. Appellant is speculating that somewhere in

the voluminous amount of records he requested, there might be something beneficial to his claim. The Campbell factors require more than a shot in the dark or the mere suggestion that something case dispositive may exist in the requested information; Appellant is required to show that there is a reasonable probability that something case-dispositive is contained in the requested information. Appellant has failed to do so, and thus he is not entitled to appellate discovery.

In conclusion, Appellant cannot simply demand extensive amounts of information of little to no relevance to his case in hopes of discovering something that *might* have some tangential relevance to his case. Since Appellant cannot meet the Campbell factors, his motion should be denied.

2. The Campbell factors do not weigh in favor of Appellant's request for all documents and communications related to his transfer from Davis-Monthan AFB to Naval Consolidated Brig Charleston.

In support of his Motion to Compel Discovery, Appellant provides one attachment, a declaration from Appellant. That declaration is the sole evidence relied upon by Appellant to justify his request to this Court. In it he claims he was told multiple times that he could not be transferred to Naval Consolidated Brig Charleston because he could not be found in the "active-duty system." (App. Dec.) Appellant's declaration alone, does not provide sufficient information to meet the high bar required to justify appellate discovery. First, Appellant's declaration does not identify a source of the information regarding the reasoning behind his multiple cancelled transfers to Naval Consolidated Brig Charleson. It merely states he was told, but not by whom. Under Campbell, Appellant bears the burden of making a *colorable* showing the evidence or information exists. Appellant's failure to identify the source of the information leaves this Court unable to determine whether the source providing the information contained in Appellant's declaration was trustworthy, competent, and informed enough to provide accurate

information to Appellant. Appellant could have provided an affidavit or a declaration from the source Appellant was receiving the information from, but he did not.

The assertion that the evidence requested in Appellant's motion to compel exists because Appellant's prior commanding officer, Lt Col W.L., indicated she would turn over the requested documents if she was told to turn them over is unconvincing. (App. Mot. to Compel at 3-4) Even if the evidence did exist, Lt Col W.L. would not be the holder of said evidence, it would be the Security Forces Squadron. It is extremely unlikely Lt Col W.L. has knowledge of what is in the records of an entirely different squadron. However, if Lt Col W.L. did have knowledge the evidence existed, Appellant could have provided an affidavit or declaration from Lt Col W.L. confirming the existence of the evidence; but again Appellant did not.

Next, Appellant's transfer to Naval Consolidated Brig Charleston occurred in February 2023. It has been over six months since his transfer. If any of the requested evidence ever did exist, there's been no demonstration by the Appellant that the evidence still exists and has not been deleted in the intervening months. The evidence requested might theoretically exist, but Appellant has not made a colorable showing that it does. Appellant's declaration is speculative at best as to what those records, if they existed, would even be or what they would show. For example, Appellant has not shown that if transfer paperwork ever existed it would have shown a reason for the transfer being cancelled or what information that paperwork would contain period. Given all these questions that remain unanswered despite Appellant's declaration, Appellant has failed to meet his burden of demonstrating a colorable showing the requested evidence or information exists.

Also, Appellant has failed to demonstrate how the putative information is relevant to appellant's claim or defense. This is largely because Appellant's request is overly broad. Not all

documents and communications from June 2022 to February 2023 related to Appellant's transfer from Davis-Monthan AFB to Naval Consolidated Brig Charleston could possibly be relevant to appellant's claim. Some prime examples of non-relevant documents and communications would be the DTS records for the security members who escorted Appellant from Davis-Monthan AFB to Charleston, emails between security forces leadership identifying said escorts, escort training records, and security forces operating instruction authorizing transfers. None of those documents would be relevant to Appellant's apparent claim of lack of personal jurisdiction at the time of his court-martial. Appellant's failure to identify with specificity what documents would be actually relevant to his claim, creates the appearance he is requesting this Court to authorize a fishing expedition through roughly eight months of records. This Court should decline to do so.

Lastly, Appellant has failed to show there is a reasonable probability the result of the proceeding would have been different if the putative information had been disclosed. Appellant does not know what information his requested discovery will provide. There's no evidence provided with his motion to demonstrate that any of the requested discovery will show Appellant was not properly recalled to active duty for his court-martial. And even if there were questions about Appellant's active-duty status *after* his court-martial, that would not mean he was not properly on active duty during the course of his court-martial. What Appellant is essentially saying in his motion is if this evidence exists, and if it says what he hopes, then that would be case dispositive. Those are too many ifs left open to justify appellate discovery. Appellant is speculating that somewhere in all the voluminous documents he's requested, there will be something case dispositive, but the standard is not one based on speculation, it requires a showing of reasonable probability and Appellant has not met that burden.

In conclusion, due to Appellant's failure to meet the Campbell factors, this Court should deny his motion.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 September 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James L. TAYLOR, Jr.	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 September 2023, Appellant's counsel moved this court to compel post-trial discovery. Specifically, Appellant requests this court order production of:

> (1) all documents and communications related to [Appellant's] military status from the time of his court-martial (27–29 June 2022) to his transfer to the Naval Consolidated Brig Charleston (February 2023), and
>
> (2) all documents and communications from June 2022 to February 2023 related to [Appellant's] transfer of confinement from Davis-Monthan Air Force Base (AFB) to the Naval Consolidated Brig Charleston.

On 20 September 2023, Appellee opposed Appellant's motion to compel.

Appellate courts should consider four factors when faced with post-trial appellate discovery disputes:

> (1) whether the defense has made a colorable showing that the evidence or information exists;
>
> (2) whether or not the evidence or information sought was previously discoverable with due diligence;
>
> (3) whether the putative information is relevant to [an] appellant's asserted claim or defense; and
>
> (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

United States v. Campbell, 57 M.J. 134, 138 (C.A.A.F. 2002).

Appellant was convicted of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. He was sentenced to a dishonorable discharge, confinement for 19 months, total forfeitures, reduction to the grade of E-1, and a reprimand. Appellant is a member of the reserve component.* Through counsel, Appellant asserts that due to his membership in the Air Force reserve component, challenges occurred in his transfer from the regular Air Force confinement facility located where he was tried, to the Consolidated Brig located at Joint Base Charleston, South Carolina, where he would serve the remainder of his confinement. Appellant suggests that evidence gathered from discovering more about why his reserve component membership would cause challenges to his confinement transfer may be helpful in furtherance of appeal before this court as to whether the Air Force had personal jurisdiction to try him at a general court-martial.

The court has considered Appellant's motion, Appellee's opposition, and applicable case law, and concludes as follows:

The defense has not made a colorable showing that the evidence or information exists. Appellant declares his transfer orders were cancelled four times between late September 2022 and mid-January 2022. On each occasion, Appellant was "told" his transfer was cancelled because he was not in the active duty "system."

The information sought would not have been previously discoverable.

The information Appellant seeks is not relevant to any claim of lack of personal jurisdiction at trial.

Appellant has not demonstrated a reasonable probability the result of the proceeding would have been different if the putative information had been disclosed.

Accordingly, it is by the court on this 28th day of September, 2023,

ORDERED:

Appellant's 14 September 2023 Motion to Compel Production of Post-Trial

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*On 22 September 2023, we granted Appellant's unopposed motion to attach a post-trial declaration, dated 8 September 2023, relating to his request for post-trial discovery, which may assist with his assignment(s) of error on appeal.

Discovery is **DENIED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.,** United States Air Force *Appellant*	)	No. ACM 40371 20 October 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 November 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022 (EOJ). The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew or" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022.

be confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396; EOJ. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt James L. Taylor Jr.*, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for the benefit of Appellant's dependent child. *Id.*

The record of trial is six volumes consisting of six prosecution exhibits, 12 defense exhibits, one court exhibit, and 36 appellate exhibits; the transcript is 396 pages. Appellant is currently confined. Undersigned counsel has reviewed the record of trial in this case, excluding sealed portions of the record.[4]

Counsel is currently representing 25 clients; 18 clients are pending initial AOEs before this Court.[5] This case is undersigned counsel's highest priority among cases pending initial AOEs before this court, but three additional matters have priority over it:

1) *United States v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel is preparing to

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[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] This Court granted Appellant's consent motion to examine sealed materials, and undersigned counsel has an appointment to view the sealed materials on 23 October 2023.

[5] Since the filing of Appellant's last request for an enlargement of time, counsel filed an AOE in *U.S. v. Ollison*, ACM S32745, completed his review of the record of trial and received this Court's order on Appellant's motion to compel production of post-trial discovery in this case, prepared for oral argument, including two practice sessions, in *U.S. v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF, and participated in practice oral arguments for two additional cases. Additionally, counsel was off .

present oral argument as lead counsel in this case to the Court of Appeals for the Armed Forces (CAAF) on 25 October 2023.

2) *United States v. Gause-Radke*, ACM 40343 – The record of trial is eight volumes consisting of 12 prosecution exhibits, six defense exhibits, 42 appellate exhibits, and four court exhibits; the transcript is 1167 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.

3) *United States v. Gonzalez Hernandez*, S32732 – The record of trial is five volumes consisting of three prosecution exhibits, one defense exhibit, 31 appellate exhibits, and two court exhibits; the transcript is 249 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant has been informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's 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 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
Director of Operations
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	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (ELEVENTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40371
JAMES L. TAYLOR, JR.,	)	
United States Air Force	)	21 November 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 (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 December 2023**. The record of trial was docketed with this Court on 3 November 2022. From the date of docketing to the present date, 383 days have elapsed. On the date requested, 420 days will have elapsed.

On 22 March and 27-29 June 2022, contrary to his pleas,[1] Appellant was convicted by a military judge at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, of one charge and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022 (EOJ). The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to

[1] Appellant was acquitted one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366.

[2] Appellant was convicted of the sexual assault specification and the abusive sexual assault specification by exceptions. The words "knew or" were excepted for each specification and Appellant was found not guilty of the excepted words for each specification. R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022.

be confined for a total of 19 months,[3] and to be dishonorably discharged from the service. R. at 396; EOJ. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt James L. Taylor Jr.*, dated 15 July 2022. The convening authority denied the Appellant's requested deferment of reduction in grade but approved the Appellant's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for the benefit of Appellant's dependent child. *Id.*

The record of trial is six volumes consisting of six prosecution exhibits, 12 defense exhibits, one court exhibit, and 36 appellate exhibits; the transcript is 396 pages. Appellant is currently confined. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.

Counsel is currently representing 27 clients; 18 clients are pending initial AOEs before this Court.[4] This case is undersigned counsel's highest priority among cases pending initial AOEs before this court, but three additional matters have priority over it:

1) *United States v. Gause-Radke*, ACM 40343 – The record of trial is eight volumes consisting of 12 prosecution exhibits, six defense exhibits, 42 appellate exhibits, and

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[3] Appellant was sentenced to be confined for 19 months (for Specification 1 of the Charge) and to be confined for 6 months (for Specification 3 of the Charge), with the sentences running concurrently. R. at 396.

[4] Since the filing of Appellant's last request for an enlargement of time, counsel prepared for and presented oral argument to the U.S. Court of Appeals for the Armed Forces (CAAF) as lead counsel in *U.S. v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF, assisted in the preparation and sat second chair for oral argument in *U.S. v. Jennings*, ACM 40282, participated in practice oral arguments for four additional cases, completed his review of the record of trial and began drafting the AOE in this case, and petitioned the CAAF for review and drafted the supplement to the petition in both *U.S. v. Gause-Radke*, ACM 40343, USCA No. 24-0028/AF, and *U.S. v. Gonzalez Hernandez*, ACM S32732, USCA No. 24-0030/AF. Additionally, counsel attended the Appellate Judges Education Institute Summit on and was off .

four court exhibits; the transcript is 1167 pages. Undersigned counsel has petitioned the CAAF to grant review in this case and drafted the supplement to the petition, which must be filed by 28 November 2023.

2) *United States v. Gonzalez Hernandez*, S32732 – The record of trial is five volumes consisting of three prosecution exhibits, one defense exhibit, 31 appellate exhibits, and two court exhibits; the transcript is 249 pages. Undersigned counsel has petitioned the CAAF to grant review in this case and drafted the supplement to the petition, which must be filed by 28 November 2023.

3) *United States v. Lake*, ACM 40168 – The record of trial is 17 volumes consisting of 101 prosecution exhibits, 14 defense exhibits, and 135 appellate exhibits; the transcript is 1418 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully advise Appellant regarding potential errors and complete an AOE. Appellant has been informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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27 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JAMES L. TAYLOR JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40371 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant will have consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

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 November 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	**)**	**No. ACM 40371**
Appellee	**)**	
	)	
v.	**)**	
	)	**ORDER**
James L. TAYLOR, Jr.	**)**	
Staff Sergeant (E-5)	**)**	
U.S. Air Force	**)**	
Appellant	**)**	**Panel 2**

On 21 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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 November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **28 December 2023**.

Appellant's counsel is advised that given the nature of this case and the number of enlargements granted thus far, absent exceptional circumstances, no further enlargement of time will be granted.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40371 28 December 2023

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

Assignments of Error

I.

WHETHER THE GOVERNMENT VIOLATED SSGT TAYLOR'S RIGHTS TO SPEEDY TRIAL UNDER BOTH RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT WHEN THE CHARGE AND SPECIFICATIONS WERE DISMISSED AND LATER REPREFERRED AS A SUBTERFUGE TO AVOID A SPEEDY-TRIAL VIOLATION.

II.

WHETHER THE GENERAL COURT-MARTIAL HAD JURISDICITON OVER SSGT TAYLOR WHEN HE DID NOT PERFORM INACTIVE DUTY TRIANING THE DAY AFTER THE CHARGED INCIDENT, HE WAS NOT ON ACTIVE DUTY FOR THE PRELIMINARY HEARING, AND THE ORDERS TO RECALL HIM TO ACTIVE DUTY WERE NEVER PROPERLY EXECUTED.

III.

WHETHER THE SPECIFICAITONS ARE DEFECTIVE BECAUSE THEY FAILED TO ALLEGE A STATUS WHICH INDICATES A BASIS FOR JURISDICTION.

IV.

WHETHER THE FINDINGS OF GUILTY ARE LEGALLY INSUFFICIENT BECAUSE NO EVIDENCE ADMITTED AT TRIAL

ESTABLISHED THE STATUS THAT SUBJECTED SSGT TAYLOR TO UCMJ JURISDICTION.

V.

WHETHER THE FINDINGS OF GUILTY ARE FACTUALLY INSUFFICIENT BECAUSE THE EVIDENCE DOES NOT PROVE SSGT TAYLOR REASONABLY SHOULD HAVE KNOWN A.G. WAS ASLEEP.

Statement of the Case

On 22 March and 27–29 June 2022 at Davis Monthan Air Force Base, Arizona, a military judge sitting as a general court-martial convicted Staff Sergeant (SSgt) James L. Taylor, Jr., contrary to his pleas, of one charge and one specification of sexual assault and one specification of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 920. These convictions were by exceptions. The words "knew or" were excepted from each specification, and SSgt Taylor was found not guilty of the excepted words for each specification. R. at 366; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 28 July 2022 (EOJ). As a result of the exceptions, SSgt Taylor was convicted of committing the charged offenses when he reasonably should have known that A.G. was asleep. *Id.* The court also acquitted SSgt Taylor of one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366; EOJ. The military judge sentenced SSgt Taylor to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 19 months,[2] and to be dishonorably discharged from the service. R. at 396; EOJ. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT Vol. 1, Convening Authority Decision on Action – *United States*

[1] Unless otherwise noted, all references to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).
[2] Appellant was sentenced to be confined for 19 months for Specification 1 of the Charge and 6 months for Specification 3 of the Charge, with the sentences running concurrently. R. at 396.

v. SSgt James L. Taylor Jr., dated 15 July 2022. The convening authority further denied SSgt Taylor's requested deferment of reduction in grade but approved SSgt Taylor's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for the benefit of SSgt Taylor's dependent child. *Id.*

Statement of Facts

SSgt Taylor engaged in sexual conduct with A.G. after seeing indications she was not asleep.

SSgt Taylor and A.G. were both reservists in the same unit. R. at 124. After unit members, including SSgt Taylor, completed individual duty training (IDT) periods on 7 December 2019, the unit held a holiday party. R. at 150, 152. Later, several people, including SSgt Taylor and A.G., went to TSgt V.A.'s house for another party. R. at 152–53. Throughout this party, A.G. flirted with SSgt Taylor, including sitting on his lap and what one witness described as "casual, physical affection." R. at 196. Eventually, TSgt V.A. suggested A.G. go to bed and took her to the spare bedroom. R. at 154–55. The party wound down, and most people left. R. at 154.

When he testified in his own defense, SSgt Taylor described how he remained at TSgt V.A.'s residence because he recognized that he was too drunk to drive. R. at 273. In the early morning hours of 8 December 2023, he went to the door of the room where A.G. was staying and asked if he could get in bed with her. R. at 209, 274. A.G. responded that yes, he could. *Id.* Once SSgt Taylor was in bed with A.G., she began moving her hips around his pelvis, and he began to rub her leg and buttocks. R. at 274. A.G. was making sounds which SSgt Taylor described as "moaning" and "sounds of pleasure." R. at 275. SSgt Taylor then penetrated A.G.'s vulva with his fingers. R. at 274. Soon after, A.G. got up from the bed and went into the attached bathroom. R. at 275–76. She soon returned, gathered her things, gave SSgt Taylor a hug, and left the residence. R. at 276.

Shortly after the incident, several other service members spoke with SSgt Taylor and A.G.

After leaving, A.G. called TSgt V.A. and said that SSgt Taylor had touched her. R. at 136, 138. SSgt Taylor went to speak with TSgt V.A., and after she handed the phone to her girlfriend, she began yelling at him about what he had done with A.G. R. at 278–79. SSgt Taylor seemed remorseful, kept apologizing, and said he had "fucked up." R. at 163, 309. TSgt V.A. ultimately told him to leave, and he did. R. at 187, 279. He called MSgt B.S. and told him what had happened. R. at 279–80. MSgt B.S. went to SSgt Taylor's residence, where he found him in a very emotional state. R. at 203–04. SSgt Taylor kept saying he was sorry and that he messed up. R. at 204. Others also came to check on SSgt Taylor, and he kept saying that he messed up and couldn't believe it. R. at 214. At one point, he also said, "Holy shit, what did I do?" *Id.* Although SSgt Taylor was scheduled for more IDT on Sunday, the unit's leadership allowed him to stay home and ensured others stayed there with him. App. Ex. X, 5, Attachment 1.

After learning of this incident, several people also went to check on A.G. R. at 138–40. MSgt B.S. left SSgt Taylor's residence and proceeded to A.G.'s residence. R. at 206. While there, A.G. told him that SSgt Taylor had asked to get in bed with her and she said yes. R. at 209. Others came to her residence, including TSgt M.A. and SMSgt P.T. R. at 139–40, 248. A.G. ultimately spent most of the rest of the day in the nearby home of one of her best friends. R. at 140.

Additional facts are included *infra* as necessary.

Argument

I.

The government violated SSgt Taylor's right to a speedy trial because the dismissal of the Charge was a subterfuge to avoid a speedy trial violation, and the extensive period of delay prejudiced SSgt Taylor.

Additional Facts

The Charge and its Specifications were initially preferred against SSgt Taylor on 1 August 2020, and a preliminary hearing was subsequently held on 25 September 2020. App. Ex. X, 2–3, Attachments 2, 9. However, the SPCMCA dismissed the Charge and its Specifications without prejudice on 11 December 2020, pursuant to the advice of his Staff Judge Advocate (SJA). *Id.* at 3, Attachments 12, 13. At the same time, the SPCMCA excluded 25 days from R.C.M. 707 speedy trial calculation for time required to process SSgt Taylor onto active duty[3] and for Defense availability. *Id.* at 3, Attachment 11. Shortly thereafter, the government sought approval from the SECAF to recall SSgt Taylor to active duty for trial. *Id.* at 3, Attachment 14. Having SECAF approval would preserve the option of confinement as a potential sentence in the event SSgt Taylor was convicted at court-martial. *Id.* Along with this request, the SPCMCA's SJA signed a legal review which indicated the purpose of the dismissal was to avoid violating the R.C.M. 707 speedy-trial clock, stating:

> Recognizing SSgt Taylor's right under Rule for Courts-Martial (RCM) 707 to be arraigned within 120 days of preferral of charges, on 11 December 2020, the Special Court Martial [sic] Convening Authority dismissed the Charge and its Specifications, without prejudice. The Charge and its Specifications will be re-preferred upon approval of the request for recall to active duty by the Secretary of the Air Force.

[3] As described in issue II *infra*, SSgt Taylor was not properly brought onto active duty.

ROT Vol. 4, Legal Review – Request to Recall to Active Duty, dated 19 January 2021, para. 4.c. The SECAF approved the recall request on 3 June 2021. App. Ex. X, 3, Attachment 14. The Charge and its Specifications were preferred again, without any changes, on 20 October 2021 and referred on 19 November 2021. *Id.* at 4, Attachments, 2, 17, 18. The military judge excluded 78 days for R.C.M. speedy-trial calculations, and SSgt Taylor was arraigned on 22 March 22. *Id.* at 4, Attachment 21; R. at 9, 22–23. The case proceeded to trial on 27 June 2022. R. at 97. Throughout this process, SSgt Taylor demanded speedy trial at least three times, on 14 August 2020, 7 December 2021, and 3 February 2022. App. Ex. X, 2, 4, Attachments 4, 22, 23.

Before arraignment, the Defense moved to dismiss the Charge and its Specifications for violation of SSgt Taylor's R.C.M. 707 speedy-trial rights. App. Ex. X. The Defense argued the dismissal and preferral did not stop or reset the speedy-trial clock, meaning the calculation of delay should start at the first preferral date. *Id.* at 8–9. The government opposed this motion, arguing that the dismissal did stop the speedy-trial clock because it was for the purpose of preserving the option of confinement by seeking SECAF approval to recall SSgt Taylor, which the government asserted was a proper purpose. App. Ex. XI, 5–6. The military judge, in a written ruling, denied the Defense's motion, holding that the dismissal was to preserve the option of confinement, which the military judge found was a proper purpose, and that the period starting with the second preferral and accounting for exclusions did not violate R.C.M. 707. App. Ex. XXIII, 7.

Standard of Review

Whether an accused was denied his right to a speedy trial is a question of law reviewed de novo. *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020).

Law and Analysis

The government violated SSgt Taylor's right to speedy trial under the standards of both R.C.M. 707 and the Sixth Amendment of the United States Constitution.

<u>The government violated the 120-day speedy-trial rule under R.C.M. 707 because the dismissal of the Charge was subterfuge.</u>

An accused shall be brought to trial within 120 days of preferral of charges. R.C.M. 707(a)(1). In the absence of subterfuge and if the accused is not under pretrial restraint, dismissal of charges ends the 120-day period, and a new period begins on the date charges are preferred anew. R.C.M. 707(b)(3)(A)(ii)(I); *see also United States v. Tippit*, 65 M.J. 69, 79 (C.A.A.F. 2007) (citing *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999)). However, if the charges were dismissed for an improper purpose or for subterfuge, the original period continues to run. R.C.M. 707(b)(3)(A)(iii). Here, the charge and its specifications were originally preferred on 1 August 2020, dismissed without prejudice on 11 December 2020, and preferred anew on 20 October 2021. App. Ex. X, 2-4, Attachments 2, 12, 13, 17. SSgt Taylor was arraigned on 22 March 2022. R. at 22–23. The SPCMCA excluded 25 days before the dismissal, App. Ex. X, Attachment 11; the military judge excluded 77 days after the second preferral in the confirmation memorandum, *id.* at Attachment 21; and the military judge later excluded one additional day after the second preferral on the record, R. at 9. Accounting for these exclusions, 496 days elapsed between the original preferral and the arraignment, while 76 days elapsed between the second preferral and the arraignment. The earlier calculation is well over 120 days. Since the dismissal and repreferral was subterfuge, as explained *infra*, this is the correct calculation to use, and the government violated SSgt Taylor's R.C.M. 707 right to a speedy trial.

A dismissal "is subterfuge if its 'sole purpose' is to avoid a speedy-trial violation," and "such a dismissal does not reset the 120-day speedy trial clock." *United States v. Hendrix*, 2017

CCA LEXIS 769, at *7 (A. Ct. Crim. App. Dec. 14, 2017) (unpub. op.), *aff'd*, 77 M.J. 454 (C.A.A.F. 2018). Here, the only reason for the dismissal on 11 December 2020 was to avoid a speedy-trial violation. This is made clear in a legal review signed by the SPCMCA's SJA, which reads:

> Recognizing SSgt Taylor's right under Rule for Courts-Martial (RCM) 707 to be arraigned within 120 days of preferral of charges, on 11 December 2020, the Special Court Martial [sic] Convening Authority dismissed the Charge and its Specifications, without prejudice. The Charge and its Specifications will be re-preferred upon approval of the request for recall to active duty by the Secretary of the Air Force.

ROT Vol. 4, Legal Review – Request to Recall to Active Duty, dated 19 January 2021, para. 4.c. This statement by the SJA, who the dismissing convening authority stated advised him on this decision, App. Ex. X, Attachment 12, clearly indicates that avoiding a violation of SSgt Taylor's right under R.C.M. 707 was the sole purpose of the dismissal, making it subterfuge. Additionally, the SPCMCA signed an exclusion of time memo on the same day he dismissed the Charge and its Specifications. App. Ex. X, 3, Attachments 11–13. This suggests a recognition that the dismissal would not stop the speedy-trial clock because if it did and a future preferral started a new one, as the government argued, this exclusion of time would be superfluous.

Because the dismissal was subterfuge to avoid a speedy-trial violation, the speedy-trial clock did not stop or reset with the dismissal and second preferral. *See United States v. Hendrix*, 2017 CCA LEXIS 769, at *7. Thus, the elapsed time for speedy-trial purposes must be calculated from the original preferral to the arraignment, and the correct calculation, accounting for excluded time, is 496 days. This is more than four times greater than the 120-day requirement under R.C.M. 707, clearly violating that rule. The remedy for failure to comply with the rule is dismissal of the affected charges, R.C.M. 707(d), so the charge and its specifications must be dismissed. The

dismissal can be with or without prejudice, but it must be with prejudice if SSgt Taylor has been deprived of his constitutional right to speedy trial. R.C.M. 707(d)(1). As the analysis *infra* shows, the government deprived SSgt Taylor of his Sixth Amendment right to speedy trial, so the dismissal should be with prejudice.

<u>The length of the delay, the reasons for the delay, SSgt Taylor's demands for speedy trial, and the prejudice he suffered show the government violated SSgt Taylor's Sixth Amendment right to speedy trial.</u>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. U.S. CONST., AMEND. VI. A speedy-trial analysis under the Sixth Amendment uses the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016). This analysis considers the entire period of the delay, from preferral until trial. *Id.* (noting that arraignment stops the speedy-trial clock for R.C.M. 707 purposes, while trial stops the speedy-trial clock for Sixth Amendment and Article 10, UCMJ, purposes); *see also United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014). The four *Barker* factors are: 1) the length of the delay, 2) reasons for the delay, 3) whether the accused demanded a speedy trial, and 4) any prejudice to the accused from the delay. *Id.* at 186.

The first *Barker* factor, the length of the delay, is treated as a threshold for determining whether further analysis is necessary. *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007). A full Sixth Amendment speedy-trial analysis is only triggered if the delay is facially unreasonable. *Danylo*, 73 M.J. at 186–87. While the 120-day standard from R.C.M. 707 is not directly applicable in this analysis, it has been used as a basis for comparison. For example, this Court in *United States v. Arma* found that a delay in excess of twice this standard was unreasonable on its face, unless justified by the specific circumstances of the case, and therefore triggered an analysis of the other three factors. No. 2014-09, 2014 CCA LEXIS 802, at *14 (A.F. Ct. Crim. App. Oct. 22,

2014) (unpub. op.). Here, the R.C.M. 707 calculation discussed *supra* is 496 days, a delay more than four times greater than the R.C.M. 707 standard. This calculation does not even account for an additional 28 days that are not attributable to Defense availability between arraignment and the start of trial on 27 June 2022, R. at 97; App. Ex. X, Attachment 21, and that time is included for the purpose of the Sixth Amendment analysis. *Wilder*, 75 M.J. at 138. This delay is far beyond both the R.C.M. 707 standard *and* what this court previously found to be facially unreasonable, so it is therefore a facially unreasonable delay.

It is also appropriate to consider circumstances such as the seriousness of the offense, the complexity of the case, and the availability of proof. *United States v. Painter*, No. ACM 39646, 2020 CCA LEXIS 474, at *71–72 (A.F. Ct. Crim. App. Dec. 23, 2020) (unpub. op.) (citing *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011)). While the offense is serious, the case is not particularly complex, and the available proof did not seem to change between the first and second preferrals, as evidenced by the unchanged charging scheme. *See* App. Ex. X, Attachments 2, 17. None of the circumstances justify the lengthy delay. This factor favors SSgt Taylor, and it is necessary to proceed with the analysis of the three remaining factors.

When considering the second factor, the reason for the delay, "different weights should be assigned to different reasons." *United States v. Cooley*, 75 M.J. 247, 260 (C.A.A.F. 2016) (quoting *Barker*, 407 U.S. at 531). A deliberate government effort to hamper the defense by delaying trial weighs heavily against the government. *Id.* Neutral reasons, such as negligence or crowded courts, also weigh against the government, although less heavily. *Id.* Valid reasons can justify appropriate delay. *Id.* The main reason the government previously provided for delay is the need to preserve the option of confinement by seeking SECAF approval for SSgt Taylor's recall. *See, e.g.,* App. Ex. XI, 6. The request process took a little over four months, *see* App. Ex. X, Attachment 14, so

it does not account for the majority of the delay. There is no evidence explaining the almost six months between the first preferral and the request to SECAF, much less the over 13 months between the initiation of the investigation and the request to SECAF. App. Ex. X, 2–3, Attachments 1, 2, 14. Likewise, there is no evidence explaining the over four months between SECAF's approval of SSgt Taylor's recall and the second preferral, nor is there evidence showing why there were two months between the second preferral and the government's ready date for trial, despite the government having almost two years to prepare its case at the time of the second preferral. *Id.* at 4, Attachments 17, 21. These delays could possibly be explained by neutral factors, like negligence and crowded court dockets, but even if they are, they weigh against the government. Considering only the lengths of the delays, the weight against the government should be significant. There were also an additional 160 days of delay attributable to the Defense, and a "delay caused by the defense weighs against the defendant." *Cooley*, 75 M.J. at 260 (quoting *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)). However, the delays attributable to the Defense were all excluded by either the SPCMCA or the military judge and have been excluded from the calculations and analysis here. App. Ex. X, Attachments 11, 21. When considering all the unexplained delays attributable to the government from initial preferral through trial, this factor weighs heavily in favor of SSgt Taylor.

The third *Barker* factor is whether the accused demanded speedy trial, which SSgt Taylor did. Indeed, he demanded speedy trial at least three times, on 14 August 2020, 7 December 2021, and 3 February 2022. App. Ex. X, 2, 4, Attachments 4, 22, 23. Thus, this factor also weighs in favor of SSgt Taylor.

The fourth and final factor concerns any prejudice to the accused from the delay. The Supreme Court has identified three interests which the speedy-trial right was designed to protect:

"(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."[4] *Barker*, 407 U.S. at 532. The Supreme Court also noted that "[o]f these [interests], the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Id.* "There is . . . prejudice if defense witnesses are unable to recall accurately events of the distant past." *Id.* There is evidence that the delay prejudiced SSgt Taylor by causing witnesses to be unable to recall the events in question, impairing his defense. For instance, A.G., the alleged victim, admitted that she could not remember things at least seven times in cross examination—that segment of the transcript contains little more than two pages. R. at 143–46. Had the case advanced to trial more quickly, it is possible she would have remembered more of these things about which the Defense was asking, which in turn could have benefited SSgt Taylor's defense. "Loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532. However, A.G.'s repeated indications that she did not remember strongly suggests her memory faded during the delays, prejudicing SSgt Taylor's defense.

SSgt Taylor also suffered particularized anxiety and concern as a result of the delays in his case. For this interest, courts are concerned about "particularized anxiety and concern greater than the normal anxiety and concern" associated with a pending trial. *United States v. Wilson*, 72 M.J. 347, 354 (C.A.A.F. 2013). Notably here, SSgt Taylor did not have an annual tour in 2021, purportedly because his annual tour was to be used for his preferral or court-martial. App. Ex. X, 19, Attachment 28. Of course, the case did not ultimately go to trial in 2021, leaving SSgt Taylor

[4] The first interest, preventing oppressive pretrial incarceration, is not at issue here because SSgt Taylor was not in pretrial confinement. App. Ex. X, 18.

without an annual tour. This meant he was unable to fulfill the requirements of his reservist contract, harming his financial situation and potential retirement and resulting in anxiety and concern. App. Ex. X, 19. This anxiety and concern is particularized to SSgt Taylor because not every member awaiting trial experiences this, and it is directly linked to the delay because that delay caused him to miss any opportunities for an annual tour. SSgt Taylor's experience awaiting trial was far from typical, and the particularized anxiety and concern he experienced constitutes prejudice. Because of the prejudice from both the impairment of SSgt Taylor's case and his particularized anxiety and concern, the fourth factor weighs in favor of SSgt Taylor.

With all four *Barker* factors weighing in favor of SSgt Taylor, the government violated his constitutional right to a speedy trial under the Sixth Amendment. This deprivation of a constitutional right means that the dismissal of the charge and its specifications, already necessitated by the violation of R.C.M. 707, must be with prejudice. R.C.M. 707(d). Moreover, the violation of his Sixth Amendment right to speedy trial independently warrants a dismissal of the charge and specification.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings and sentence and dismiss the Charge and its Specifications with prejudice.

II.

The general court-martial lacked personal jurisdiction over SSgt Taylor because he did not perform IDT the day after the offense, was not on active duty for the preliminary hearing under Article 32, UCMJ, and was not properly issued active-duty orders for arraignment or trial.

Additional Facts

SSgt Taylor was not placed on active duty for the preliminary hearing, which occurred on 25 September 2020. App. Ex. X, Attachment 9. Rather, he was on paid inactive duty on that day. *See id.* at Attachments 2, 9, 28. After the Secretary of the Air Force (SECAF) approved his recall

to active duty, the General Court-Martial Convening authority (GCMCA) issued a series of documents directing his involuntary recall to active duty for disciplinary purposes including arraignment and trial. *E.g.,* App. Ex. X, Attachments 16, 19; ROT Vol. 4, DM MFR-003, DM MFR-004, DM MFR-005. However, no further actions effectuated these recall directions, such as issuing an AF Form 938, *Request and Authorization for Active Duty Training/Active Tour*, and there is no evidence indicating SSgt Taylor was actually placed on active duty. App. Ex. XXVII.

After referral of the Charge and its Specifications, the Defense filed a motion to dismiss for lack of jurisdiction. App. Ex. X.[5] The motion focused largely on personal jurisdiction at the time of the alleged offense, but during argument, the Defense also argued the court lacked personal jurisdiction for arraignment and trial. App. Ex. X; R. at 14–15. The government opposed this motion. App. Ex. XI. After receiving additional information regarding jurisdiction that he ordered the government to produce, App. Exs. XXV, XXVI, the military judge found there was UCMJ jurisdiction over SSgt Taylor both at the time of the alleged offense and for trial. App. Ex. XXIX.

Standard of Review

"Jurisdiction is a legal question which [this Court] review[s] de novo." *United States v. Ferrando*, 77 M.J. 506, 510 (A.F. Ct. Crim. App. 2017) (quoting *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)). "When challenged, the government must prove jurisdiction by a preponderance of evidence." *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019) (citing *United States v. Morita*, 74 M.J. 116, 121 (C.A.A.F. 2015)). Additionally, this Court reviews questions of statutory interpretation de novo. *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016).

[5] App. Ex. X includes both the motion to dismiss for speedy trial violation and the motion to dismiss for lack of jurisdiction.

Law and Analysis

The general court-martial did not have personal jurisdiction over SSgt Taylor for three reasons: 1) SSgt Taylor did not perform IDT the day following the events in question, meaning there was no basis for jurisdiction at the time of the offense; 2) SSgt Taylor was not on active duty at the time of the preliminary hearing under Article 32, UCMJ, so the Charge and its Specifications were improperly referred to a general court-martial without a proper preliminary hearing; and 3) SSgt Taylor did not receive orders to active duty for either arraignment or trial, meaning the court lacked jurisdiction at the time of trial.

<u>The court-martial lacked jurisdiction at the time of the offense because SSgt Taylor did not perform IDT on consecutive days.</u>

Members of a reserve component are subject to UCMJ jurisdiction while on IDT and during certain specified periods. Art. 2(a)(3)(A), UCMJ, 10 U.S.C. § 802(a)(3)(A). One of the specified periods consists of the "[i]ntervals between inactive duty training on consecutive days, pursuant to orders or regulations." Art. 2(a)(3)(B)(iii), UCMJ, 10 U.S.C. § 802(a)(3)(B)(iii). Here, there is no dispute that SSgt Taylor performed IDT on 7 December 2019 and was scheduled to perform IDT on 8 December 2019.[6] *See, e.g.,* App. Ex. XXIX, 2. It is also clear that SSgt Taylor remained at his home, accompanied by another member, on 8 December 2019, meaning he did not perform IDT that day. *Id.* Because SSgt Taylor did not perform IDT on 8 December 2019, the Air Force did not have jurisdiction at the time of the offense.

The term "inactive-duty training" is statutorily defined as:

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

[6] Although SSgt Taylor was scheduled for IDT, there is no evidence he received orders for these days; his unit did not generate orders for reservists for monthly IDT. R. at 54.

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

10 U.S.C. § 101(d)(7); *see also* R.C.M. 103(23) (incorporating definitions from 10 U.S.C. § 101). During the charged timeframe, the SECAF prescribed such duties in Air Force Manual (AFMAN) 36-2136, *Reserve Personnel Participation*, dated 6 September 2019.[7] This regulation described four types of IDT: 1) training period, which is "[a] period of training, duty, or instruction;" 2) unit training assembly (UTA), which is "[a] planned period of training, duty, instruction, or test alert completed by an Air Force Reserve Unit;" 3) equivalent training, which is "[a] Training Period accomplished in place of a missed Unit Training Assembly or Training Period;" and 4) additional IDT periods, which is "training in excess of statutorily prescribed training." AFMAN 36-2136, para. 4.1. Additionally, the regulation clearly stated, "Inactive Duty Training performed for pay has to prepare a reservist for mobilization." *Id.* at para. 4.2.2. SSgt Taylor's actions on 8 December 2019 do not fall into any of these categories or meet the requirements for IDT. Staying at home with another member does not prepare a reservist for mobilization, so it does not qualify to be IDT performed for pay. Likewise, SSgt Taylor staying at home is not training, duty, or instruction, certainly cannot be a UTA, and did not take the place of a missed UTA or training period. SSgt Taylor's activities on 8 December 2019 simply do not meet the requirements for IDT.

While several documents indicate that SSgt Taylor received pay and points for IDT on 8 December 2019, *see* App. Exs. XVI–XIX, they should not be considered conclusive. SSgt Taylor

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[7] This publication has since been superseded by Department of the Air Force Manual (DAFMAN) 36-2136, *Reserve Personnel Participation*, dated 15 December 2023.

did not report to Davis-Monthan Air Force Base or sign-in for IDT on 8 December 2019. App. Ex. X, 5; *see also* App. Ex. XXIX, 2. Since he did not sign-in, a reasonable inference is that someone else recorded his performance of IDT on that day, triggering the pay and points he received. Merely receiving pay and points, especially if in error, does not transform non-qualifying activities into IDT. It is important to assess the underlying activities, as the regulation prescribing duty for reservists under the applicable statute focuses on the type of activity (training, duty, or instruction). *See* 10 U.S.C. § 101(d)(7); AFMAN 36-2136, para. 4.1. SSgt Taylor activities that day do not qualify as IDT despite how the day was recorded. Similarly, these activities do not become IDT simply because the unit's command authorized them. Both parties agreed that SSgt Taylor was authorized to stay home because the command had concerns for his well-being and safety, App. Ex. XXIX, 2, but the authorization does not transform SSgt Taylor's actions into IDT. Commanders can excuse a missed IDT or approve equivalent training or rescheduled IDT. AFMAN 36-2136, para. 4.7.1. The regulation does not allow commanders to designate otherwise non-qualifying activities as IDT. Since SSgt Taylor stayed at home on 8 December 2019, an action which does not meet the requirements of IDT, his command's authorization to do so is better viewed as an excusal from IDT. Despite the records presented, the uncontested reality of what SSgt Taylor did on 8 December 2019 shows that he did not perform IDT, and the military judge's finding that he did was therefore in error.

Since SSgt Taylor did not perform IDT on 8 December 2019, the court-martial did not have personal jurisdiction over him for the charged conduct. The UCMJ provides for jurisdiction over reservists for intervals between IDT on consecutive days. Art. 2(a)(3)(A), UCMJ, 10 U.S.C. § 802(a)(3)(A). The plain meaning of this statutory language is that there must be IDTs performed on consecutive days for jurisdiction under this provision; it does not say anything about intervals

between scheduled or excused IDTs. Here, the charged conduct occurred overnight between 7 and 8 December 2019, specifically in the early morning hours of 8 December 2019. *See, e.g.,* R. at 125, 130, 135; App. Ex. XXIX, 4. Since SSgt Taylor did not actually perform IDT on 8 December 2019, despite being scheduled to do so, the conduct in question did not occur in an interval between IDT on consecutive days, contrary to the military judge's conclusion. App. Ex. XXIX, 4. Thus, SSgt Taylor was not subject to UCMJ jurisdiction for conduct at that time, and the court-martial lacked personal jurisdiction over him for the charged offenses.

<u>SSgt Taylor was not on active duty for the preliminary hearing, so the Charge and its Specifications were improperly referred to a general court-martial without a proper preliminary hearing.</u>

A member of a reserve component may be involuntarily ordered to active duty for a preliminary hearing under Article 32, UCMJ, trial by court-martial, or nonjudicial punishment under Article 15, UCMJ. Art. 2(d)(1), UCMJ, 10 U.S.C. § 802(d)(1). The Discussion accompanying R.C.M. 204(a) further specifies that service regulations "should describe procedures for ordering a reservist to active duty for disciplinary action, preferral of charges, preliminary hearings, forwarding of charges, referral of charges, designation of convening authorities and commanders authorized to conduct nonjudicial punishment proceedings, and for other appropriate purposes." Read together, these provisions indicate a reservist needs to be on active duty for a preliminary hearing under Article 32, UCMJ.

The convening authority recognized the necessity for a reservist to be on active duty for a preliminary hearing in a memorandum ordering SSgt Taylor's recall to active duty for disciplinary action. ROT Vol. 4, Recall to Active Duty for Court-Martial, dated 30 August 2021. In that memorandum, the convening authority stated, "Authority is granted to release SSgt Taylor from active duty subsequent to any investigation under Article 32, UCMJ." *Id.* Despite this indication

that the government was aware of the requirement for SSgt Taylor to be on active duty for his preliminary hearing, it failed to meet this requirement.

SSgt Taylor was not on active duty for the preliminary hearing under Article 32. The preliminary hearing took place on 25 September 2020. ROT Vol. 4, Continuation of DD Form 457, 20 November 2020, *United States v. Staff Sergeant James L. Taylor*, 10. On that day, SSgt Taylor was on paid inactive duty status. App. Ex. X, Attachment 28. This follows the government's indicated intent to accomplish SSgt Taylor's preliminary hearing on an IDT day. *Id.* at Attachment 7. However, inactive duty is insufficient to meet the requirement that SSgt Taylor be on active duty for the preliminary hearing. *See* Art. 2(d)(1), UCMJ, 10 U.S.C. § 802(d)(1); R.C.M. 204(a), Discussion. The memorandum from the convening authority, which authorized SSgt Taylor's release from active duty "subsequent to any investigation under Article 32, UCMJ," did not remedy this issue because the convening authority signed it more than 11 months after the preliminary hearing took place. ROT Vol. 4, Recall to Active Duty for Court-Martial, dated 30 August 2021. There was no other preliminary hearing, and the special court-martial convening authority (SPCMCA) cited the 25 September 2020 hearing when forwarding the charges to the general court-martial convening authority, stating an additional preliminary hearing was not required under R.C.M. 405(b). ROT Vol. 4, Forwarding of Court-Martial Charges – *U.S. v. Staff Sergeant James L. Taylor, Jr.* 924th Aircraft Maintenance Squadron, Davis-Monthan Air Force Base, Arizona, dated 3 November 2021.

The failure to have SSgt Taylor in the proper duty status for the preliminary hearing creates a jurisdictional problem.[8] A convening authority cannot refer a charge to a general court-martial

[8] Failure to follow the requirements of Article 32 does not constitute jurisdictional error. Article 32(g), UCMJ, 10 U.S.C. § 832(g). However, that provision is not applicable to this error

until completion of a preliminary hearing in substantial compliance with R.C.M. 405. R.C.M. 405(a), 601(d)(2). A preliminary hearing conducted when the accused is not in the proper duty status is defective and therefore cannot be used to satisfy this requirement. Without a properly completed preliminary hearing, the referral of the charge to a general court-martial was also improper. *See id.* "Proper referral is a jurisdictional prerequisite to a court-martial." *United States v. Richards*, No. ACM 38346, 2016 CCA LEXIS 285, at *162 (A.F. Ct. Crim. App. May 2, 2016) (unpub. op.) (citing *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012); R.C.M. 201(b)(3)). Without this prerequisite, the court-martial lacked jurisdiction over SSgt Taylor.

<u>The orders recalling SSgt Taylor to active duty were not properly executed, meaning SSgt Taylor was not placed on active duty and the court-martial lacked jurisdiction at the times of arraignment and trial.</u>

"A member of a reserve component must be on active duty prior to arraignment at a general or special court-martial." R.C.M. 204(b)(1). Only a GCMCA in a regular component may involuntarily order a member of a reserve component to active duty for trial by court-martial. Art. 2(d)(4), U.C.M.J., 10 U.S.C. § 802(d)(4). Once a GCMCA orders such a recall, that recall needs to be executed by issuing the member orders to active duty. *See, e.g., Ferrando*, 77 M.J. at 512 (stating "[t]he GCMCA's command was administratively executed and Appellant was issued active duty orders for the preliminary hearing and trial"); *United States v. Lull*, No. ACM 39555, 2020 CCA LEXIS 301, at *21 (A.F. Ct. Crim. App. Sep. 2, 2020) (unpub. op.) (stating "[t]he commander's recall was then administratively executed, and Appellant was issued an AF Form 938, as amended, that effectuated the commander's intent and directed Appellant's '*involuntary*

because not placing SSgt Taylor on active duty for his preliminary hearing is a failure to follow the requirements of Article 2, UCMJ, and R.C.M. 204.

call[-]up pending court martial action"). This last step—the execution of the GCMCA's command and effectuation of his intent—was missing in this case.

SSgt Taylor was never issued orders for active duty for his arraignment or trial. In fact, the local force support squadron provided a memo confirming no AF Form 938 was generated because, "It is not the practice of FSS to generate AF Form 938." App. Ex. XXVII. To complete the process of bringing SSgt Taylor onto active duty for trial by court-martial, he needed to receive orders, as did the appellants in *Ferrando* and *Lull.* 77 M.J. at 512; 2020 CCA LEXIS 301, at *21. In both of those cases, this Court rejected the argument that administrative errors on the AF Form 938 meant jurisdiction was lacking, but this case is distinguishable because SSgt Taylor did not receive an AF Form 938 at all. *Ferrando*, 77 M.J. at 512; *Lull*, 2020 CCA LEXIS 301, at *20–*22. This omission is more than simply an administrative error; it is a failure to complete a necessary process for recalling a member to active duty. The GCMCA's order was not executed, and the process of bringing SSgt Taylor onto active duty for trial by court-martial was not completed because he did not receive orders. Thus, he was not properly on active duty at the time of his court-martial, and the court lacked jurisdiction to try him.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings and sentence and dismiss the Charge and its Specifications.

III.

The specifications of which SSgt Taylor was convicted are defective because they failed to allege a status that indicates the basis for jurisdiction.

Standard of Review

"Whether a specification is defective and the remedy for such error are questions of law" reviewed de novo. *Ballan*, 71 M.J. at 33 (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)). "[A] charge that is defective because it fails to allege an element of an offense,

if not raised at trial, is tested for plain error." *Id.* at 34 (citing *United States v. Cotton*, 535 U.S. 625, 631–32 (2002); *United States v. Sinks*, 473 F.3d 1315, 1320–21 (10th Cir. 2007)).

Law and Analysis

When an accused is subject to the UCMJ under Article 2(a) subsections (3) through (12), 10 U.S.C. § 802(a) subsections (3) through (12), "[t]he specification should describe the accused's armed force, unit or organization, position, or status which will indicate the basis of jurisdiction." R.C.M. 307(c)(3), Discussion (C)(iv)(b). In cases under the listed subsections, the information in the specification needs to indicate the basis of jurisdiction, while it is not ordinarily necessary to do so for members on active duty. *Id.*; R.C.M. 307(c)(3), Discussion (C)(iv)(a); *see also Lull*, 2020 CCA LEXIS 301, at *15 (noting a specification needs to describe the status indicating a basis for jurisdiction "when an accused is not on active duty"). SSgt Taylor was not on active duty at the time of the offense, and the purported basis for jurisdiction is found in Article 2(a)(3), one of the listed subsections. According to the military judge's ruling on the defense's motion to dismiss for lack of jurisdiction, SSgt Taylor is subject to the UCMJ for the charged offenses because those offenses occurred "during an interval of time between IDTs on consecutive days." App. Ex. XXIX, 4. Since this jurisdictional basis falls under Article 2(a)(3), 10 U.S.C. § 802(a)(3), the specifications against SSgt Taylor needed to describe something which indicates the basis for jurisdiction. R.C.M. 307(c)(3), Discussion (C)(iv)(b). The specifications failed to do so. While the specifications state that he is a member of the United States Air Force and the Squadron, this was insufficient because they do not indicate the basis of jurisdiction. ROT Vol. 1, DD Form 458, *Charge Sheet*. Simply being a member of the th Squadron as a reservist, as SSgt Taylor was, App. Ex. XXIX, 1, does not confer UCMJ jurisdiction by itself. There is no indication in the specifications of the status which

purportedly conferred UCMJ jurisdiction over the charged offenses or any status which would do so. This is error, and the specifications are defective.

Because SSgt Taylor did not object to the defective specifications at trial, this Court reviews for plain error. *Ballan*, 71 M.J. at 34 (citing *United States v. Girouard*, 70 M.J. 5, 11–12 (C.A.A.F. 2011)). For a plain error analysis, the accused must demonstrate that "(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused." *Girouard*, 70 M.J. at 11. As detailed in the analysis *supra*, R.C.M. 307(c)(3) and its accompanying discussion require that a specification against a member subject to the UCMJ under Article 2(a)(3) indicate the basis of jurisdiction. The specifications against SSgt Taylor do not do so, which is an error that is plain and obvious. Thus, the remaining question is whether this error materially prejudiced a substantial right of SSgt Taylor.

In *Girouard*, the court held the appellant suffered prejudice to substantial rights rooted in the Fifth and Sixth Amendments by being convicted of an offense that was not a lesser included offense (LIO) of the charged offense. 70 M.J. at 11. "The Fifth Amendment provides that no person shall be 'deprived of life, liberty, or property, without due process of law,' U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation,' U.S. Const. amend. VI." *Id.* at 10. Similarly, the court in *United States v. Fosler* set aside findings of guilty and dismissed the charge and specification under Article 134 when it failed to allege the terminal element, noting that "[t]he Constitution protects against conviction of uncharged offenses through the Fifth and Sixth Amendments." 70 M.J. 225, 229, 233 (C.A.A.F. 2011). Although this case does not involve an LIO or the terminal element of Article 134, it is similar because SSgt Taylor's convictions rely on information that should have been included in the specifications but was not. According to R.C.M. 307(c)(3) and its

accompanying discussion, the specifications needed to indicate the basis of jurisdiction due to the status that purportedly provided the basis for jurisdiction. Since they failed to do so, they did not fully inform SSgt Taylor of the nature and cause of the action as they should have. Yet, SSgt Taylor was convicted as if the specifications had included the necessary description of his status. Like the prejudice found in *Girouard* and *Fosler*, these convictions despite defective specifications prejudiced SSgt Taylor's substantial rights rooted in the Fifth and Sixth Amendments. Consequently, the appropriate remedy is dismissal of the defective charge and specifications.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings of guilty and the sentence and dismiss the Charge and its Specifications.

IV.

The findings of guilt are legally insufficient because the government introduced no evidence of the status that subjected SSgt Taylor to UCMJ jurisdiction.

Standard of Review

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

Law and Analysis

As detailed in the analysis of issue III *supra*, the specifications needed to describe the status which indicated the basis for jurisdiction. R.C.M. 307(c)(3), Discussion (C)(iv)(b). Since this is a necessary element of the specifications, it follows that the government needed to introduce evidence to prove this basis for jurisdiction at trial. In *United States v. Miller*, the Army Court of Criminal Appeals set aside and dismissed a conviction on a charge and specification to which the appellant pled guilty because the plea colloquy focused on a basis for jurisdiction that was different from the basis in the specification. 78 M.J. 835, 846–47 (A. Ct. Crim. App. 2019). That finding

implies that it is necessary to prove the basis in the specification. Although the issue of UCMJ jurisdiction was extensively litigated during pretrial motions, *see* App. Exs. X, XI, XXIX, none of the evidence admitted at trial proved the basis for jurisdiction. This Court "may affirm only such findings of guilty . . . as the Court finds correct in law." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). No rational trier of fact could find an element beyond a reasonable doubt when none of the evidence admitted proves that element. Since none of the evidence admitted at trial proved the basis for jurisdiction, a required element of the specification, no rational trier of fact could have found this element. The findings of guilt are therefore legally insufficient.

This Court has previously rejected the argument that language in AFI 51-201, *Administration of Military Justice*, requires proof of jurisdiction at trial. *Lull*, 2020 CCA LEXIS 301, at *16–17; *United States v. Gardner*, No. ACM S30091, 2003 CCA LEXIS 198, at *4–5 (A.F. Ct. Crim. App. Mar. 27, 2003) (unpub. op.). But both of those cases involved reservists who were on active duty at the time of the charged misconduct, so there was no requirement to indicate the basis for jurisdiction in the specifications because doing so is not necessary for members on active duty. *Lull*, 2020 CCA LEXIS 301, at *15–16; *Gardner*, 2003 CCS LEXIS 198, at *4; *see also* R.C.M. 307(c)(3), Discussion (C)(iv)(a). In contrast here, SSgt Taylor was not on active duty at the time of the alleged offense, so it was necessary to indicate the basis for jurisdiction in the specification. R.C.M. 307(c)(3), Discussion (C)(iv)(b). The specifications needed to include information that was not required for the specifications in *Lull* and *Gardner*, and elements which

are necessary for a specification should also be proven at trial. Further, *Lull and Gardner* both note that the language in AFI 51-201 is advisory and was not intended "to create a new element for offenses committed by reservists beyond those defined by Congress in the UCMJ, or detailed by the President in the *Manual for Courts-Martial*." *Lull*, 2020 CCA LEXIS 301, at *17 (quoting *Gardner*, 2003 CCA LEXIS 198, at *4–5). The requirement here is based on R.C.M. 307(c)(3) and its accompanying discussion, not AFI 51-201, and a Rule for Courts-Martial is a superior authority to an Air Force Instruction. Indeed, the R.C.M. are detailed by the president in the *Manual for Courts-Martial*, a source which does contain the elements for offenses, as the Court observed in *Lull* and *Gardner*. *Id.* These differences distinguish this case from *Lull* and *Gardner*. This Court should hold that when R.C.M. 307(c)(3) and its accompanying discussion require specifications to describe the status which indicates the basis of jurisdiction, that basis must also be proven by evidence admitted at trial. The rule required the specifications to indicate the basis of jurisdiction here, and since no evidence admitted at trial established that basis, the findings of guilty are legally insufficient and should be set aside.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

V.

The findings of guilty are factually insufficient because the evidence does not prove that SSgt Taylor should have known A.G. was asleep.

Standard of Review

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

Law and Analysis

Many critical facts are not in dispute because of SSgt Taylor's own testimony. He acknowledged being in bed with A.G. and penetrating her vulva with his fingers. R. at 274–75. He also recounted A.G. getting up, going to the bathroom, returning, and then leaving after gathering her things and giving him a hug. R. at 275–76. The key factual dispute is whether SSgt Taylor reasonably should have known A.G. was asleep. In both specifications of which he was convicted, SSgt Taylor was alleged to have committed the acts in question "when he knew or reasonably should have known that [A.G.] was asleep." ROT Vol. 1, DD Form 458, *Charge Sheet*. In his findings, the military judge found SSgt Taylor not guilty as to the words "knew or" in both specifications, indicating the government failed to meet its burden of proving SSgt Taylor knew A.G. was asleep. R. at 366. He found SSgt Taylor guilty based on a finding that SSgt Taylor reasonably should have known A.G. was asleep, and it is that finding which merits a close review. *Id.*

This Court "may affirm only such findings of guilty . . . as the Court finds correct in . . . fact." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). Here, there is no evidence showing why SSgt Taylor reasonably should have known A.G. was asleep. A.G. testified that she fell asleep and woke up to a feeling of fingers inside her vagina and the feeling of lips on the cheek of her buttocks. R. at 131–32. In contrast, SSgt Taylor testified that he went to the door and asked A.G. if he could sleep with her, and that she responded yes. R. at 274. A.G. testified she did not remember this, but it was corroborated by the

testimony of another witness, MSgt B.S., who testified that the next day, A.G. told him SSgt Taylor asked if he could lay in bed with her and she said yes. R. at 144, 209. Responding to a question tends to indicate a person is awake, so SSgt Taylor should not reasonably have known A.G. was asleep at the time she responded to his question.

SSgt Taylor went on to testify that, once he was in bed with A.G., she began moving her hips around his pelvis, and he rubbed her leg and then her butt. R. at 274. He also testified that, during these interactions, she was making noises and moaning, which he described as sounds of pleasure. R. at 275. These interactions—A.G. answering his question, moving her hips around his pelvis, making noises and sounds of pleasure—create reasonable doubt that SSgt Taylor reasonably should have known she was asleep. A person would reasonably think someone interacting with them in these ways is not asleep, and there is no evidence of any contrary indications which should reasonably have caused SSgt Taylor to know she was asleep.

It is also important to note that SSgt Taylor did not confess to the charged offenses, as the government argued he did. R. at 352. TSgt V.A. testified that SSgt Taylor appeared remorseful and kept apologizing. R. at 163. MSgt B.S. similarly testified that SSgt Taylor kept saying he was sorry and that he messed up. R. at 204. CMSgt S.G. testified that he kept saying he messed up and he couldn't believe it and that he heard him say, "Holy shit, what did I do?" R. at 214. Finally, SSgt Taylor himself acknowledged that he told TSgt V.A. he "fucked up." R. at 309. These statements are expressions of remorse for having, as SSgt Taylor put it, "misread the situation." R. at 329. They do not necessarily indicate that the elements of the offenses are met, and they certainly do not indicate SSgt Taylor knew A.G. was asleep, as reflected in the findings of not guilty as to the language that he knew she was asleep. R. at 366. SSgt Taylor can feel

remorseful even if there was no reason he should have known she was asleep, and his statements do not prove his guilt.

The military judge's finding of not guilty on the element that SSgt Taylor knew A.G. was asleep indicates he found SSgt Taylor's testimony credible. The additional facts to which SSgt Taylor testified—A.G. responding to his question, moving her hips around his pelvis, and making noises and sounds of pleasure—should likewise be considered credible, and these facts cast doubt on the element that he reasonably should have known A.G. was asleep. Because the evidence leaves reasonable doubt that SSgt Taylor reasonably should have known A.G. was asleep, this Court should have reasonable doubt about his guilt and should exercise its authority under Art. 66, UCMJ, 10 U.S.C. § 866, by not approving the findings of guilty.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 December 2023.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' ANSWER TO**
Appellee,	)	**ASSIGNMENTS OF ERROR**
	)	
v.	)	Before Panel 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40371
JAMES L. TAYLOR, USAF	)	
Appellant.	)	29 January 2024

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

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INDEX OF BRIEF

TABLE OF AUTHORITIES..iv

ASSIGNMENTS OF ERROR..1

STATEMENT OF THE CASE..2

STATEMENT OF FACTS..2

ARGUMENT..14

I. THE GOVERNMENT PROTECTED APPELLANT'S RIGHTS TO SPEEDY TRIAL UNDER BOTH RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT WHEN IT DISMISSED THE CHARGE AND SPECIFICATIONS AND LATER REPREFERRED AFTER RECEIVING SECRETARY OF AIR FORCE AUTHORIZATION TO PRESERVE THE POSSIBILITY OF CONFINEMENT UPON CONVICTION..14

Additional Facts..15

Standard of Review..18

Law..19

Analysis..22

II. THE GENERAL COURT-MARTIAL HAD JURISDICITON OVER APPELLANT WHEN HE COMMITTED HIS CRIMES THE EVENING BETWEEN TWO CONSECUTIVE DAYS OF INACTIVE DUTY FOR TRAINING, HE WAS IN DUTY STATUS FOR THE PRELIMINARY HEARING, AND THE ORDERS TO

RECALL HIM TO ACTIVE DUTY WERE LAWFULLY ISSUED. 27

Additional Facts 28

Standard of Review 31

Law 32

Analysis 32

III. THE SPECIFICATIONS ARE LEGALLY SUFFICIENT BECAUSE THEY ALLEGE APPELLANT'S MILITARY STATUS, WHICH FORMS A BASIS FOR JURISDICTION. 39

Standard of Review 39

Law 39

Analysis 40

IV. THE FINDINGS OF GUILTY ARE LEGALLY SUFFICIENT BECAUSE THE EVIDENCE PROVES THE STATUS THAT SUBJECTED APPELLANT TO UCMJ JURISDICTION. 42

Standard of Review 42

Law 42

Analysis 42

V. THE FINDINGS OF GUILTY ARE FACTUALLY SUFFICIENT BECAUSE THE EVIDENCE PROVES APPELLANT REASONABLY SHOULD HAVE KNOWN

A.G. WAS ASLEEP. 43

Standard of Review 44

Law 44

Analysis 44

CONCLUSION 46

CERTIFICATE OF FILING AND SERVICE 47

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

Barker v. Wingo, 407 U.S. 514 (1972) 17, 18, 20, 21, 24, 25
United States v. Cotton, 535 U.S. 625, 631–32 (2002) 39

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012) 32
United States v. Anderson, 50 M.J. 447 (C.A.A.F. 1999) 20
United States v. Cendejas, 62 M.J. 334 (C.A.A.F. 2006) 39
United States v. Chandler, 80 M.J. 425 (C.A.A.F. 2021) 38
United States v. Cooley, 75 M.J. 247 (C.A.A.F. 2016) 21
United States v. Cossio, 64 M.J. 254 (C.A.A.F. 2007) 21
United States v. Danylo, 73 M.J. 183 (C.A.A.F. 2014) 18, 21, 24, 25, 27
United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) 41, 42
United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011) 39, 41
United States v. Guyton, 82 M.J. 146 (C.A.A.F. 2022) 18, 19
United States v. Hale, 78 M.J. 268 (C.A.A.F. 2019) 31, 32, 35
United States v. Hendrix, 77 M.J. 454 (C.A.A.F. 2018) 19, 20
United States v. Lazauskas, 62 M.J. 39 (C.A.A.F. 2005) 19
United States v. Leahr, 73 M.J. 364 (C.A.A.F. 2014) 20
United States v. Mason, 21 C.M.A. 389 (C.M.A. 1972) 22
United States v. Mizgala, 61 M.J. 122 (C.A.A.F. 2005) 22
United States v. Morita, 74 M.J. 116 (C.A.A.F. 2015) 31
United States v. Oliver, 70 M.J. 64 (C.A.A.F. 2011) 40, 42
United States v. Phillips, 58 M.J. 217 (C.A.A.F. 2003) 33
United States v. Robinson, 77 M.J. 294 (C.A.A.F. 2018) 42
United States v. Reed, 54 M.J. 37 (C.A.A.F. 2000) 44
United States v. Reid, 46 M.J. 236 (C.A.A.F. 1997) 39
United States v. Tippit, 65 M.J. 69 (C.A.A.F. 2007) 17
United States v. Tippit, 73 M.J. 364 (C.A.A.F. 2014) 20
United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006) 21
United States v. Washington, 57 M.J. 394 (C.A.A.F. 2002) 42, 44
United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016) 18, 20
United States v. Wilson, 72 M.J. 347 (C.A.A.F. 2013) 21, 26

AIR FORCE COURT OF CRIMINAL APPEALS

United States v. Arma, No. 2014-09, 2014 CCA LEXIS 802 (A.F. Ct. Crim. App. 22 Oct. 2014) (unpub. op.) 24
United States v. Ferrando, 77 M.J. 506 (A.F. Ct. Crim. App. 2017) 38
United States v. Fujiwara, 64 M.J. 695 (A.F. Ct. Crim. App. 2007) 18

United States v. Gardner, No. ACM 30091, 2003 CCA LEXIS 198 (A.F. Ct. Crim. App. 27 Mar. 2003) (per curiam) (unpub. op.), *rev. denied*, 59 M.J. 116 (C.A.A.F. 2003) 41, 43
United States v. Lull, No. ACM 39555, 2020 CCA LEXIS 301 (A.F. Ct. Crim. App. 2 Sep. 2020) 38, 39, 40, 41, 43
United States v. O'Connor, No. ACM 38420, 2015 CCA LEXIS 47 38
United States v. Painter, No. ACM 39646, 2020 CCA LEXIS 474 (A.F. Ct. Crim. App. 23 Dec. 2020) 25
United States v. Toro, No. 2013-23, 2013 CCA LEXIS 852 (A.F. Ct. Crim. App. 1 Oct. 2013) (unpub. op.) 38

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Hendrix, No. 20170439, 2017 CCA LEXIS 769 (A. Ct. Crim. App. 14 Dec. 2017) (unpub. op.), *aff'd*, 77 M.J. 454 (C.A.A.F. 2018) 19, 20
United States v. Robinson, 47 M.J. 506 (N-M Ct. Crim. App. 1997) 23
United States v. Wolpert, 75 M.J. 777 (A. Ct. Crim. App. 2016) 33

STATUTES

2016 National Defense Auth'n Act, 114 P.L. 328, 130 Stat. 2000, 2016 Enacted S. 2943... 32, 32, 34
Article 2, UCMJ.. 15, 22, 32, 33, 34, 35, 37, 40
Article 66(c), UCMJ 39

OTHER AUTHORITIES

Air Force Manual 36-2136, *Reserve Personnel Participation* (6 Sep. 2019)......................... 33, 36
Department of Air Force Instruction 51-201, *Administration of Military Justice* 39, 40, 42
Department of Air Force Guidance Memorandum 2021-02.. 22, 41, 43
Military Justice Review Group, REPORT OF THE MILITARY JUSTICE REVIEW GROUP 153-56 (22 Dec. 2015).. 34, 35
R.C.M. 307(c)(3)... 39, 40
R.C.M. 707... passim

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER** **TO ASSIGNMENTS OF ERROR**
v.	)	No. ACM 40371
Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.**, USAF, *Appellant.*	)	Panel No. 2 29 January 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE GOVERNMENT VIOLATED SSGT TAYLOR'S RIGHTS TO SPEEDY TRIAL UNDER BOTH RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT WHEN THE CHARGE AND SPECIFICATIONS WERE DISMISSED AND LATER REPREFERRED AS A SUBTERFUGE TO AVOID A SPEEDY-TRIAL VIOLATION.

II.

WHETHER THE GENERAL COURT-MARTIAL HAD JURISDICTION OVER SSGT TAYLOR WHEN HE DID NOT PERFORM INACTIVE DUTY TRAINING THE DAY AFTER THE CHARGED INCIDENT, HE WAS NOT ON ACTIVE DUTY FOR THE PRELIMINARY HEARING, AND THE ORDERS TO RECALL HIM TO ACTIVE DUTY WERE NEVER PROPERLY EXECUTED.

III.

WHETHER THE SPECIFICATIONS ARE DEFECTIVE BECAUSE THEY FAILED TO ALLEGE A STATUS WHICH INDICATES A BASIS FOR JURISDICTION.

IV.

WHETHER THE FINDINGS OF GUILTY ARE LEGALLY INSUFFICIENT BECAUSE NO EVIDENCE ADMITTED AT TRIAL ESTABLISHED THE STATUS THAT SUBJECTED SSGT TAYLOR TO UCMJ JURISDICTION.

V.

WHETHER THE FINDINGS OF GUILTY ARE FACTUALLY INSUFFICIENT BECAUSE THE EVIDENCE DOES NOT PROVE SSGT TAYLOR REASONABLY SHOULD HAVE KNOWN A.G. WAS ASLEEP.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

A.G. testified at the court-martial. (R. at 122.) She was a reservist crew chief with S at the time of the alleged crimes. She and Appellant were acquaintances at work. She was aware he was a friend of TSgt V.A., whom she called "Aggie," who was also in the unit. She only went out socially once with TSgt V.A. and Appellant. (R. at 123-24.) On 7 December 2019, there was a Christmas party; several met at TSgt V.A.'s house to carpool together to party. A.G. arrived at TSgt V.A.'s house at 1700 or 1730 hours, and arrived at the party at around 1800 hours. (R. at 125.) Appellant was not at the Christmas party. After having food and drinks, A.G. left the party around 2200 hours and went to TSgt V.A.'s house. (R. at 126.) TSgt V.A. was turning age 30, so there was an "after party" for her at her home with approximately 12 people. TSgt V.A. and Appellant each made A.G. a drink. (R. at 127.) A.G. and Appellant played video games together for 10 to 15 minutes. He told her she looked nice, but she did not interpret it as being flirtatious, because everybody was dressed up for the Christmas party. (R. at 128.) A.G. was going to sleep in TSgt V.A.'s guest bedroom, because she had work in the morning. (R.

at 129.) A.G. felt buzzed but wasn't sick, stumbling, or slurring her words. She went to bed at 0100 hours. The party was winding down and people were leaving at that time, because everybody had to work later that day. (R. at 130.) A.G. fell asleep pretty soon. She was alone. She remembered waking up later, laying on her side in a fetal position, with fingers inside of her vagina. (R. at 131.) A.G. also felt kissing on her buttocks. (R. at 132.) After initially freezing and not being able to move for approximately 20 seconds, A.G. snapped out of it, got up as fast as she could, and went to the bathroom. She was in disbelieve, wondering what was going on, why it was happening, and what to do. She turned on the lights and gathered her belongings. She saw Appellant sitting on the bed. (R. at 133.) Appellant was the person who was touching and kissing A.G. It was approximately 0400 hours. A.G. got into her car and called TSgt V.A. (R. at 134.) A.G. had not indicated to Appellant it would be okay for him to do those things to her. (R. at 135.) They had not discussed sex and had not kissed. She did not invite him into her bed or into the room. (R. at 136.)

A.G. could not reach TSgt V.A., so she called TSgt V.A.'s girlfriend, Ms. G.F. TSgt V.A. answered Ms. G.F.'s phone. (R. at 136.) A.G.'s heart was racing, she was scared, and she was trying to figure out what happened. The call was within 10 minutes of the sexual assault. (R. at 137.) A.G. told TSgt V.A. that she woke up and Appellant was touching her. TSgt V.A. gave the phone to Ms. G.F., who was yelling and confronting Appellant. After that, A.G. went home. She received a call from MSgt B.S., her former supervisor. He brought over a female, TSgt M.A., whom A.G. considered her "work mom," so she (A.G.) would not be alone. The first sergeant came and went. (R. at 138.) Then, TSgt M.A. and MSgt B.S. took A.G. to breakfast and then dropped her off with a friend, A P , at whose apartment A.G. stayed until the afternoon. (R. at 140.)

On cross-examination, A.G. did not recall telling MSgt B.S. that Appellant asked permission to get in bed with her. (R. at 144.) When A.G. returned from the bathroom to the bedroom, she gathered her things, hugged Appellant, and left. (R. at 145.) She did so because she did not want Appellant to stop her from leaving. (R. at 146.)

TSgt V.A. testified at the court-martial. (R. at 149.) She met Appellant when they were both stationed at Ellsworth AFB, South Dakota in 2010, and they were "really close" friends. (R. at 150.) TSgt V.A. met A.G. in early 2019. They were in the same unit and they worked out at the gym together. (R. at 151.) After the Christmas party, TSgt V.A. invited some people from work back to her house. (R. at 152.) Several people were at her party, including Appellant, and they were playing video games, drinking games, and hanging out. TSgt V.A. saw Appellant make a drink for A.G. (R. at 153.) She was not exactly clear, but she testified she might have seen A.G. and Appellant hugging, because when Appellant drinks, he hugs many people. The party started to wind down after 0200 hours. Appellant was going to sleep on the couch, and A.G. was in the guest bedroom. (R. at 154.) A.G. went to sleep at about 0300 hours. TSgt V.A. gave her a glass of water and a trash can just in case. Appellant came in, said good night to her, gave her a kiss on the cheek, and left. (R. at 155.) TSgt V.A. locked the door to the guest bedroom and closed it. (R. at 156.) TSgt V.A. identified the door to the guest bedroom. It was very easy to unlock from outside the room with a thumbnail or a quarter. (R. at 160.)

After TSgt V.A. went to sleep, Ms. G.F. woke her up, and TSgt V.A. saw A.G.'s call coming into Ms. G.F.'s phone. TSgt V.A. answered the call. A.G. was scared and crying. She said she was driving home, and that she had woken up to Appellant touching her. (R. at 161.) Then, TSgt V.A. heard a knock at her door, and it was Appellant. (R. at 162.) Appellant appeared remorseful and sorry, and he kept apologizing. He was slurring his words a little bit. TSgt V.A.'s

home had a video recording system inside. (R. at 163.) She saved the recordings including herself, A.G., and/or Appellant. (R. at 164.) She turned the four recordings over the Office of Special Investigations. (R. at 165; Pros. Ex. 3.)

Prosecution Exhibit 3, Attachment 1b, which starts at 0425 hours on 8 December 2019, shows A.G. leave a room off the dining area, turn on the flashlight on her phone in the dark, sit on the floor to put on her shoes, and leave. (See R. at 167.)

Prosecution Exhibit 3, Attachment 1c, which starts at 0433 hours, shows Appellant walk from the room off the dining area, go to the kitchen, and, after a device starts playing a song, he picks it up.[1] Appellant holds the phone, walks around the kitchen and dining area for a couple of minutes, during which time the phone stopped ringing, and then returns to the room off the kitchen, still holding the phone.

Prosecution Exhibit 3, Attachment 1a, which starts at 0437 hours, captures the sound (but not video) of Appellant repeatedly knocking on a door and whispering.[2] It eventually captures audio of TSgt V.A. confronting Appellant about what had happened. When she asked him why he touched A.G., he replied that he was drunk. Appellant acknowledged he "fucked up," when TSgt V.A. told him he could be in trouble because he was on "military orders." (Pros. Ex. 3, Attachment 1a.)

Prosecution Exhibit 3, Attachment 1d, which starts at 0446 hours, captures Appellant walk into TSgt V.A.'s kitchen, knocked on a door, and then start a conversation with TSgt V.A. in which he repeatedly admitted that he "fucked up," he "honestly did not mean to do that," he was "fucking drinking," and he was "absolutely sorry" he "did that to her." (See R. at 168.)

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[1] TSgt V.A. testified at the trial that the device was her phone, and the song was a ringer assigned to calls from A.G. (R. at 167-68.)

[2] During TSgt V.A.'s testimony, she identified the voices as Appellant's and hers.

On cross-examination, TSgt V.A. testified she locked the guest bedroom door from the inside before leaving, and Appellant came in and kissed A.G. good night while she was putting her to bed. (R. at 173.) Appellant had been TSgt V.A.'s best friend, he knew about her own prior sexual assault victimization in 2016, and he helped her avoid the perpetrator who worked in their unit. TSgt V.A. put A.G. to sleep because she (A.G.) was intoxicated. (R. at 174.)

Ms. Ms. G.F. testified at the court-martial. (R. at 177.) She worked for a private company. She knew Appellant as the friend of her ex-girlfriend, TSgt V.A., and A.G. in the same capacity. (R. at 178.) The Christmas after-party started at 2200 hours. People, including Appellant, were drinking, hanging, talking, smoking outside, and being happy and drunk. (R. at 179.) A.G. was very drunk, slurring her speech. Ms. G.F. had an eye on A.G., because if she kept going, she was going to vomit. (R. at 180.) A.G. went to sleep at around 0200 hours. (R. at 181.) While Ms. G.F. and TSgt V.A. put A.G. to sleep, Appellant and another person at the party knocked on the door to say good night. At first, A.G. did not want them to come in, but eventually she let them in to say good night. (R. at 182.)

After falling asleep, Ms. G.F. woke up to use the bathroom. (R. at 185.) While in the bathroom, A.G. called Ms. G.F. and told TSgt V.A. to answer it. During the conversation with A.G., TSgt V.A. got progressively upset and angry. (R. at 186.) Then, Appellant knocked on their bedroom door and said, "[TSgt V.A.], I got to talk to you." TSgt V.A. handed the phone to Ms. G.F., who then spoke with A.G. TSgt V.A. was yelling at Appellant. Ms. G.F. asked A.G. why she left, and she told Ms. G.F., among other things, "I just woke up and he was on top of me." Ms. G.F. asked, "Who?" A.G. said, "Taylor [Appellant]." TSgt V.A., meanwhile, was yelling at Appellant, "Get the fuck out of my house, I can't even look at you right

now, I can't believe you, get out, I don't want to talk to you, leave!" A.G. sounded shaken and upset. (R. at 187.)

During cross-examination, Ms. G.F. testified that A.G. looked visibly drunk, so she and TSgt V.A. took A.G. into her (Ms. G.F.'s) room after she had fallen asleep a bit on the couch. (R. at 189.) Ms. G.F. saw TSgt V.A. turn the lock on the door and heard her announce she was locking it. (R. at 190.)

After the phone call and confrontation, everybody left the house. TSgt V.A. was crying, angry, and upset. She kept repeating, "I know I locked the door; I know I locked the door." She and Ms. G.F. went through the timeline of events together, and TSgt V.A. was confused how anybody could have opened the guest bedroom door. (R. at 192.)

Ms. M.A. testified at the court-martial. (R. at 194.) She went to the Christmas party on 7 December 2019 and the party at TSgt V.A. and Ms. G.F.'s house. Ms. M.A. knew of Appellant and met him once or twice at other house parties. (R. at 195.) Ms. M.A. had not met A.G. before 7 December 2019. She saw A.G. and Appellant having a friendly or flirtatious conversation during a card game. They engaged in casual hand on shoulder touching. Ms. M.A. remembers A.G. at one point ending up on Appellant's lap, at which point he sat her on her chair and told her, "You're too drunk for that." (R. at 196.)

MSgt B.S. testified at the court-martial. (R. at 200.) He was an aircraft technician with the th Squadron and an Air Reserve Technician (ART). (Id.) He had been A.G.'s supervisor for approximately two years. He had known Appellant since 2017. (R. at 201.) He considered Appellant a friend. (Id.) They hung out outside of work a handful of times a month. (R. at 202.)

On 8 December 2019, MSgt B.S. and Appellant spoke by phone at about 0400 hours. Appellant called MSgt B.S. and said repeatedly that he had messed up, he's sorry, and asked if MSgt B.S. would come over. (R. at 202.) Appellant sounded frantic and shaky. When MSgt B.S. arrived, Appellant was in his car on his phone. (R. at 203.) Appellant then got out of his car. It appeared he had been crying. He kept saying he was sorry, he apologized, and he had messed up. Appellant said that he was laying in bed, that he touched A.G., that he was sorry for doing so, and that he didn't mean to hurt anybody. (R. at 204.) Appellant told MSgt B.S. that he "put his hands in her pants and touched her lady parts." He said he "stuck his finger in her vagina." MSgt B.S. told Appellant he would be calling his supervision, that is, his flight chief and the first sergeant. (R. at 205.) When CMSgt S.G. arrived, MSgt B.S. told him what he heard. (R. at 206.)

MSgt B.S. then called A.G. to make sure she was okay and then head over to her home. He then called TSgt M.A., who met him at A.G.'s apartment to check on her. (R. at 206.) They took her to breakfast at a restaurant. A.G. seemed like lost in her own thoughts and confused. She was normally a chipper, happy person, full of energy, but it was the complete opposite that day. (R. at 207.)

During cross-examination, MSgt B.S. testified Appellant told him that he had asked A.G. if it was okay to lay down in bed and she said, "Yes." (R. at 209.) On redirect examination, MSgt B.S. testified that TSgt M.A. and SMSgt P.T. were present during that conversation with Appellant. (R. at 210.)

CMSgt S.G. testified at the court-martial. (R. at 212.) He met Appellant at the 7 December 2019 Christmas party. As Appellant's first sergeant, he received a call during the early morning hours of 8 December that something happened, and he needed to go over to Appellant's apartment. (R. at 213.) Appellant was very inebriated and had been crying. He kept saying he messed up and

he couldn't believe it. Appellant said, "Holy shit, what did I do?" He repeated himself and appeared "pretty distraught." (R. at 214.)

SSgt C.G. testified at the court-martial. (R. at 216.) He was an ART in the th Squadron. He had known Appellant almost 10 years as a friend. (R. at 217.) SSgt C.G. was Appellant's best friend and was like an uncle to his kid. (R. at 218.) On 8 December 2019, when he arrived at Appellant's home, Appellant was physically shaking and quite emotional. (R. at 219.) SSgt C.G. could not recall what Appellant said. (R. at 220.) When trial counsel impeached SSgt C.G. during his testimony with a prior inconsistent statement, SSgt C.G. admitted having told counsel during a pretrial interview that Appellant told him he (Appellant) was very sorry for what he did. (R. at 227.) SSgt C.G. admitted Appellant told him he went into the bedroom with A.G. (R. at 228.) He also admitted he told counsel that Appellant said he had "fingered" her. (R. at 229-30.)

SSgt D.W. testified at the court-martial. He was an Air Guard Reserve. (R. at 233.) He was friends with Appellant and saw him biweekly around December 2019, and he was "at-work" friends with A.G. He was also friends with TSgt V.A., with whom he would also hang out with Appellant. (R. at 234-35.) SSgt D.W. arrived at TSgt V.A.'s party on 7 December 2019 at approximately 2200 hours. Appellant and A.G. had about three large cups of alcohol that night. Appellant and A.G. interacted in a friend, playful way, but not in a flirting manner. (R. at 235.) A.G. went to sleep around 0300 hours, when everybody was leaving the party. TSgt V.A. went to sleep before A.G. SSgt D.W. did not recall TSgt V.A. helping A.G. to the bedroom to go to sleep, or Appellant going in to say good night. (R. at 236.) SSgt D.W. went to sleep around 0320 hours. When he woke up at 0700 hours, Ms. G.F. was telling him what happened. His first interaction with Appellant after that was when he was driving home. SSgt

C.G. called SSgt D.W. and told him to come over to Appellant's home. SSgt D.W. met with SSgt C.G. outside Appellant's home and then went to talk with him. Appellant looked sad and hurt. Appellant told them he had "fingered her and he felt like crap." (R. at 237.) It was an emotional experience and they all cried. (R. at 238.)

On cross-examination, SSgt D.W. testified A.G.'s demeanor the night in question had been playful with him and with Appellant while they played video games. At some point, her dress rode up, and SSgt D.W. and Appellant "helped her to remain concealed during that" by trying to get her to put on shorts or sweatpants. (R. at 239.) After playing video games, A.G. and Appellant wrestled. SSgt D.W. did not recall Appellant going to say good night to A.G. or talking to her in the guest bedroom. (R. at 240.)

The military judge asked why the experience was emotional for SSgt D.W., and he replied, in part, "Like, I felt bad that my friend did something that he himself thought was unthinkable." (R. at 241.)

TSgt M.A. testified at the court-martial. She knew Appellant and A.G. from work with the Air Force. (R. at 244.) The morning of 8 December 2019, while it was still dark, TSgt M.A. went to A.G.'s residence. A.G. told her that she had gone to TSgt V.A.'s apartment, went to sleep, and woke up with Appellant's finger inside of her. TSgt M.A. did not recall A.G. ever saying she invited Appellant into the room or into the bed. (R. at 245.) MSgt B.S. was present for the conversation, as well. (R. at 246.)

SMSgt P.T. testified at the court-martial. Prior to 8 December 2019, she had no relationship with Appellant or A.G. (R. at 247.) That morning, at 0600 hours, the first sergeant asked SMSgt P.T. to go to A.G. and obtain her written statement. When SMSgt P.T. arrived at A.G.'s residence, a male supervisor and a female friend were already present. She

was upset but did not appear intoxicated. (R. at 248.) SMSgt P.T. recalls A.G. saying she went to a Christmas party and ended up in Appellant's apartment and woke up with him touching her vagina. A.G. woke up, was scared, went to the bathroom, and locked herself in there. A.G. did not tell SMSgt P.T. how Appellant and A.G. got into the room together. A.G. wrote a one-page statement. (R. at 249.)

On cross-examination, SMSgt P.T. recounted that A.G. said she had been drinking in a group. They ended up in the same room. A.G. told her she woke up and he was touching her. (R. at 251.)

Ms. A.P. testified at the court-martial. (R. at 253.) She went to physical therapy school with A.G., whom she had known for three years. On 8 December 2019, A.G. came to Ms. A.P.'s home mid-morning. A.G. was hysterical in a way Ms. A.P. had never seen her so upset. (R. at 254.)

A.G. testified a second time at the court-martial. (R. at 256.) When she was at home on 8 December 2019 after the sexual assault, MSgt B.S. and TSgt M.A. were with her as she talked to the first sergeant. She did not recall telling them she had invited Appellant into her bed with her. She reviewed Prosecution Exhibit 4, and confirmed it was the written statement she provided on 8 December 2019. (R. at 257.)

During a hearing on the defense motion for a finding of not guilty under R.C.M. 917, the military judge permitted A.G. to testify a third time, regarding the allegation that Appellant placed his mouth on her vulva. (R. at 265.) She woke up on 8 December 2019 to his fingers sliding inside her and then she felt his lips on her buttocks, making its way down. The fingers inside of her vulva are what woke her up. At the same time, while she was asleep, she felt Appellant kissing her buttocks. She testified that soon thereafter, "He got lower and lower. I felt

it near the opening of my vagina." She confirmed Appellant made physical contact with her vulva. (R. at 266.)

During the defense case, Appellant testified. (R. at 272.) At the 7 December 2019 party, Appellant began to feel A.G. was flirting with him. There were multiple occasions of them wrestling together, her constantly finding her way over to Appellant, sitting on his lap, and playful banter throughout the night. Originally, his plan was not to spend the night at TSgt V.A.'s home. He decided to stay because he was drunk and did not want to drive. (R. at 273.) Because SSgt D.W. was already on the couch, Appellant decided to see if he could sleep with A.G. He went over to the door, knocked, and asked if he could sleep with her. She said, "Yes." Appellant could not recall if he opened the door or if she did so. When he laid down, they moved closer to each other into a "spooning" position. A.G. started moving her hips around his pelvis area, and he slowly started to rub her leg. Then he slowly started moving up to rubbing her buttocks. After that, he slowly moved over to her vaginal area and digitally penetrated her. He believed he had an indication she was aroused. (R. at 274.) That is, Appellant perceived that she "was lubricated." He denied touching her vulva or buttocks with his mouth. He believed he could touch her in that manner because of her flirting and appearing interested in "extra activities," as well as her moving of her hips, slight noises and moaning, making it seem she was in a "state of pleasure." He denied believing she was asleep. (R. at 275.)

Appellant testified he was confused when A.G. abruptly got up and went to the bathroom. When she left, her demeanor was "fine, calm." He asked her if everything was okay, and she did not reply. He helped her get her belongings. She came back, gave him a hug, and left. (R. at 276.) Appellant testified about looking for his phone, using TSgt V.A.'s phone, speaking with TSgt V.A. and what happened afterwards. (R. at 277-82.) Appellant explained that he had

told witnesses he had "messed up" or "couldn't believe it," because he had misread the situation with A.G. He denied having told MSgt B.S. he had sexually assaulted A.G. (R. at 282.) After speaking with MSgt B.S., Appellant called his best friend and then a neighborhood friend. When he told his neighbor that he might have sexually assaulted somebody, he was considering a "worst case scenario," based on what A.G. and TSgt V.A. were saying to him. He was not admitted that he had committed a crime. When he was interacting with A.G. in the bed, he did not have any indication she was asleep; to the contrary, he had indications she was awake and participating. (R. at 283.)

During cross-examination, Appellant could not recall what time it was when he went into A.G.'s bedroom. (R. at 285.) He did not know what time she went into the bedroom. (R. at 286.) Appellant rejected the testimony of three other witnesses that there was a plan for Appellant to sleep on the couch. (R. at 287.) Appellant rejected any statement by SSgt D.W. that the couch was big enough for both of them. He denied having made any drinks for A.G. (R. at 288-89.) Appellant acknowledged that A.G. was "too drunk" when she sat on his lap, but he did not remember helping her with SSgt D.W. when her skirt hiked up too high. (R. at 290-91.) Appellant remember TSgt V.A. putting A.G. to sleep. Appellant and A.G. never had any kind of relationship or flirtations before that night. (R. at 292.)

Appellant felt it was appropriate to go into the bedroom of A.G., a young and intoxicated woman he barely knew, at 0400 hours, after she had gone to sleep, after she flirted with him once during the evening. (R. at 293.) Appellant claimed that, after A.G. had initially been asleep for a bit, he spoke from the kitchen to her through the bedroom door. (R. at 294-97.) During the sexual acts, there was no talking by either person. At some point, she abruptly got up and said she had to go to the bathroom. (R. at 298-99.) Appellant testified initially that he did not

remember telling the OSI he did not know why A.G. was upset; however, after reviewing the video of his statement, Appellant remembered saying that to the OSI. (R. at 300-05.) He gave the statement to the OSI after TSgt V.A. had told him why A.G. was upset; that is, because of him inserting his fingers into her vagina. (R. at 306.) When TSgt V.A. confronted Appellant about why he did what he did, he told her it was because he was drunk, not because A.G. was touching him or that she let him lay in the bed with her. (R. at 307.) Appellant admitted he told TSgt V.A. he had no excuses for what he did. (R. at 309-10.) Appellant testified he could not recall telling SSgt C.G. or SSgt D.W. that he had "fingered" A.G. He did not know why the three of them were crying together. (R. at 320.)

During redirect examination, Appellant testified his statement to OSI was approximately a year and a half earlier.- (R. at 327.)

Upon questioning by the military judge about why Appellant had said to TSgt V.A., "I'm absolutely sorry I did that to my friend," Appellant said he had "misread the situation wrong" with A.G. and he had believed she was "accepting and willing for sexual acts." (R. at 329.) When Appellant and SSgt C.G. were crying together, it was because of the misunderstanding. (R. at 329-30.)

ARGUMENT

I.

THE GOVERNMENT PROTECTED APPELLANT'S RIGHTS TO SPEEDY TRIAL UNDER BOTH RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT WHEN IT DISMISSED THE CHARGE AND SPECIFICATIONS AND LATER REPREFERRED AFTER RECEIVING SECRETARY OF AIR FORCE AUTHORIZATION TO PRESERVE THE POSSIBILITY OF CONFINEMENT UPON CONVICTION.

Additional Facts

1. Procedural History

On 1 August 2020, the Charge and its Specifications were initially preferred against Appellant. Charge Sheet; see also (App. Ex. X, Attachments 2 and 13).

On 14 August 2020, Appellant made his first speedy trial demand. (App. Ex. X, Attachment 4.)

On 25 September 2020, the preliminary hearing pursuant to Article 32, Uniform Code of Military Justice (UCMJ), took place. (App. Ex. X, Attachment 9.)

On 7 December 2020, Appellant made his second speedy trial demand. (App. Ex. X, Attachment 22.)

On 11 December 2020, the Special Court-Martial Convening Authority (SpCMCA) dismissed the Charge and its Specifications without prejudice. (App. Ex. X, Attachment 12.)

Also on 11 December, the SpCMCA excluded 25 days from R.C.M. 707 speedy trial calculation for time required to process SSgt Taylor onto active duty and because of defense unavailability. (App. Ex. X, Attachment 11.)

On 3 June 2021, the Acting Secretary of the Air Force (SecAF) granted the 26 January 2021 request of Maj Gen Koscheski, 15 AF/CC, the General Court-Martial Convening Authority (GCMCA), to recall Appellant to preserve the possibility of confinement if convicted at court-martial. (App. Ex. X, Attachment 14.)[3]

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[3] Only a GCMCA in a regular component of the armed forces – such as Maj Gen Koscheski -- may order a member of the reserve component to active duty involuntarily for the purpose of a preliminary hearing and trial by court-martial under Article 2(d). Moreover, "unless the order to active duty was approved by the Secretary concerned," a member involuntarily ordered to active duty pursuant to Article 2(d) may not be sentenced to confinement. Article 2(d)(5), UCMJ.

On 20 October 2021, the second Charge Sheet was preferred and, on 19 November 2021 it was referred to trial by court-martial. Charge Sheet; see also (App. Ex. X, Attachment 17.)

On 7 December 2021, the Chief Trial Judge issued a memorandum, "Confirmation of 'Arraignment and Initial Trial Dates'" in which noted key dates and excluded 78 days from speedy trial computations under R.C.M. 707.

On 3 February 2022, Appellant made his third speedy trial demand. (App. Ex. X, Attachment 23.)

On 22 March 2022, Appellant was arraigned. (R. at 22–23.)

Prior to arraignment, Appellant moved to dismiss the Charge and its Specifications, alleging speedy trial violations. (App. Ex. X.) The government opposed the motion. (App. Ex. XI.) The government also provided a detailed chronology of the case's procedural history, as well as 24 attachments, mostly email strings, showing government processing Appellant's recall for trial by court-martial. (App. Ex. XX.) The military judge denied the motion by written ruling. (App. Ex. XXIII.)

2. Military Judge's Ruling on Speedy Trial pursuant to R.C.M. 707

In the military judge's Ruling on the defense claim of a speedy trial violation, he found the government demonstrated by a preponderance of the evidence that the convening authority properly dismissed the originally preferred charges in the case, which reset the R.C.M. 707 speedy trial clock. (App. Ex. XXIII, para. 27.) He further found Appellant was brought to trial, for purposes of R.C.M. 707, within 120 days of the second preferral. (Id.)

The military judge found that, upon learning that the government had not obtained Secretarial approval for recalling Appellant to active duty, the convening authority directed

dismissal of the originally preferred charges without prejudice. (Id., para. 28.) The military further found:

> There is no evidence that the convening authority withdrew the charges for the sole purpose of evading the 120-day clock. Instead, the dismissal was done for the legitimate, command purpose of obtaining SECAF Approval of the Accused's recall to active duty, in order to preserve confinement as a potential punishment if the Accused is convicted of any of the charged offenses. The convening authority did not dismiss the originally preferred charges as a subterfuge to avoid speeding trial concerns, and, as such, the dismissal reset the R.C.M. 707 speeding trial clock. The second preferral occurred on 20 October 2021 and, based on the time properly excluded by the Chief Trial Judge and this Court, the Accused was brought to trial within 120 days of the second preferral. On that basis, no violation of R.C.M. 707 occurred and no relief is warranted on that basis.

Id., para. 28. The military judge noted that, although dicta, the Court of Appeals for the Armed Force has stated:

> [E]ven if the desire to obtain Secretarial approval [for the recall of a reserve member to active duty to face trial by court-martial] was a matter considered by the SJA or convening authority [for dismissal of charges], that would not establish that the command took such action as a subterfuge to evade the R.C.M. 707 speedy trial clock.

United States v. Tippit, 65 M.J. 69, 80 (C.A.A.F. 2007). (App. Ex. XXIII, paras. 15-16).

3. Military Judge's Ruling on Speedy Trial pursuant to Sixth Amendment

In evaluating Appellant's Sixth Amendment claim and the first of four factors under Barker v. Wingo, 407 U.S. 514 (1972), that is, length of the delay, the military judge found that, of 250 days from the second preferral on 20 October 2021 to trial on 27 June 2022, defense unavailability caused 147 days of delay. Thus, the delay chargeable against the government was 103 days. (App. Ex. XXIII, para. 29.a.)

As to the second Barker factor, the military judge stated there was "little evidence" to explain the reason for the delays from 20 October 2021 (the second preferral date) to 3 January

2022 (the government ready date) and from 31 May 2022 (the defense ready date) to 27 June 2022 (the trial date). Thus, the military judge found this second Barker factor weighed "slightly in favor of the Defense." (App. Ex. XXIII, para. 29.b.)

As for the third Barker factor, the military judge noted Appellant demanded speedy trial at least three times, including close in time to the initial preferral of charges on 1 August 2021. However, the defense was not ready to proceed to trial until 31 May 2022, which, he found, "weighs against their speedy trial demands." Nonetheless, the military judge found overall that this third Barker factor weighed "slightly in favor of the Defense." (App. Ex. XXIII, para. 29.c.)

As to the fourth factor, prejudice, the military judge found, "The Defense has not shown that the Accused suffered any prejudice as a result of the delay in this case." (App. Ex. XXIII, para. 29.d.) The judge noted Appellant had not been subjected to pretrial confinement, the child custody issues (in which Appellant was ordered temporary custody of child because biological mother suffered a mental health issue and was unable to care for the child) were not connected in any way to the proceedings of the court-martial, and the defense had not shown their ability to present a defense had been impaired by any delay. (Id.)

On 27 June 2022, the case proceeded to trial.

Standard of Review

Whether an accused was denied his right to a speedy trial is a question of law reviewed de novo. United States v. Guyton, 82 M.J. 146, 151 (C.A.A.F. 2022) (citing United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016) (for R.C.M. 707) and United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014) (for Sixth Amendment)). In doing so, the Court gives "substantial deference to findings of fact made by the military judge and will not overturn such findings unless they are clearly erroneous." United States v. Fujiwara, 64 M.J. 695, 697 (A.F. Ct. Crim. App. 2007).The

standard of review for a military judge's decision to grant a delay, rendering that period excludable for speedy trial purposes, is for an abuse of discretion. Id. (citing United States v. Lazauskas, 62 M.J. 39, 41-42 (C.A.A.F. 2005)).

Law

1. R.C.M. 707 Speedy Trial Legal Framework

An accused must "be brought to trial within 120 days after . . . [p]referral of charges." United States v. Guyton, 82 M.J. 146, 150 (C.A.A.F. 2022) (citing R.C.M. 707(a)(1)). For purposes of R.C.M. 707, an "accused is brought to trial . . . at the time of arraignment." Id. (citing R.C.M. 707(b)(1)). Ordinarily, when an accused is not under pretrial restraint and charges are dismissed, a new 120-day time period begins on the date of repreferral. Id. (citing R.C.M. 707(b)(3)(A)(i); United States v. Hendrix, 77 M.J. 454, 456 (C.A.A.F. 2018)).

The Discussion under Rule 707(c)(1) considers as reasonable bases for granting an excludable delay in bringing an accused to trial the need for the following:

> [T]ime to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; ***time to process a member of the reserve component to active duty for disciplinary action***; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Id. (emphasis added).

"In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: 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." R.C.M. 707(d)(1).

As the Court of Appeals for the Armed Forces stated in Hendrix:

> To determine whether Appellant's R.C.M. 707 rights were violated by the convening authority's dismissal and repreferral, we apply the legal standard from United States v. Leahr, 73 M.J. 364, 369 (C.A.A.F. 2014). "Absent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect." Id. Leahr elaborates on our statement in United States v. Tippit, 73 M.J. 364 (C.A.A.F. 2014), that "[o]nce charges are dismissed, absent a subterfuge, the speedy-trial clock is restarted." 65 M.J. 69, 79 (C.A.A.F. 2007) (alteration in original) (citing United States v. Anderson, 50 M.J. 447, 448 (C.A.A.F. 1999)). In Leahr, we defined a proper reason (in the context of a discussion of R.C.M. 604 which governs withdrawal of charges from court-martial) as "a legitimate command reason which does not 'unfairly prejudice' an accused." 73 M.J. at 369 (internal quotation marks omitted) (citation omitted).

77 M.J. at 456-57.

As the Army Court of Criminal Appeals stated in United States v. Hendrix, No. 20170439, 2017 CCA LEXIS 769 (A. Ct. Crim. App. 14 Dec. 2017) (unpub. op.), *aff'd*, 77 M.J. 454 (C.A.A.F. 2018), a dismissal "is subterfuge if its 'sole purpose' is to avoid a speedy-trial violation." Id. at *7. Subterfuge is "deception by artifice or stratagem in order to conceal, escape, or evade." Id. (internal citation omitted).

2. Sixth Amendment Speedy Trial Legal Framework

A speedy-trial analysis under the Sixth Amendment uses the four factors set forth in Barker. Wilder, 75 M.J. at 138. The four Barker factors are: (1) the length of the delay, (2) the reasons for the delay, (3) whether the accused demanded a speedy trial, and (4) any prejudice to the appellant from the delay. Id. at 186.

The first Barker factor, the length of the delay, is treated as a threshold for determining whether further analysis is necessary. United States v. Cossio, 64 M.J. 254, 257 (C.A.A.F. 2007). Unless the length of the delay is facially unreasonable, the full due process analysis will not be triggered. Danylo, 73 M.J. at 186.

When considering the second factor, the reason for the delay, "different weights should be assigned to different reasons." United States v. Cooley, 75 M.J. 247, 260 (C.A.A.F. 2016) (quoting Barker, 407 U.S. at 531). A deliberate government effort to hamper the defense by delaying trial weighs heavily against the government. Id. Neutral reasons, such as negligence or crowded courts, also weigh against the government, although less heavily. Id. Valid reasons can justify appropriate delay. Id.

The fourth and final factor concerns any prejudice to the accused from the delay. The Supreme Court has identified three interests which the speedy-trial right was designed to protect: "(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." Barker, 407 U.S. at 532. 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. Wilson, 72 M.J. 347, 353 (C.A.A.F. 2013) (internal citation omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

The Supreme Court explained the overall analysis of the Barker factors:

> We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum,

> these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

407 U.S. at 533.

The Court of Appeals for the Armed Forces has reiterated, "[W]e remain mindful that we are looking at the proceeding as whole and not mere speed: 'The essential ingredient is orderly expedition and not mere speed.'" United States v. Mizgala, 61 M.J. 122, 129 (C.A.A.F. 2005) (quoting United States v. Mason, 21 C.M.A. 389, 393 (C.M.A. 1972)).

Analysis

1. R.C.M. 707 Analysis

Based on the reasonable findings and rulings of the Military Judge, there were less than 120 days chargeable against the speedy trial clock, and the dismissal and repreferral of charges was to preserve the possibility of a sentence including imprisonment, so there was no government subterfuge. See Article 2(d), UCMJ; Department of the Air Force Instruction (DAFI) 51-201, *Administration of Justice*, para. 4.14 (18 Jan. 2019, as amended by Department of the Air Force Guidance Memorandum (DAFGM) 2021-02, 15 Apr. 2021) (confinement only possible if order to active duty approved by Secretary of the Air Force).

Appellant unsuccessfully tries to argue the dismissal of charges for the purpose of obtaining SecAF approval, to preserve the possibility of imprisonment, is a subterfuge. But the Discussion to R.C.M. 707 recognizes such delays as reasonable for purposes of excluding them from the speedy trial clock. The government was not going to exceed the speedy trial clock while it waited for SecAF approval to recall Appellant, because that delay was properly excusable. , This was not a case where the government had no legitimate reason for the delay and dismissed the charges to cover up for that fact. Thus, dismissing and later repreferring charges for the same purpose cannot be considered improper or a subterfuge. Instead, the government recognized that

to preserve the possibility of confinement they needed to seek SecAF approval and decided the best way to accomplish that was simply to start the process all over. And because the government decided to dismiss the charges in December 2020 and did not re-prefer them until October 2021, Appellant was able to have 10 months without preferred charges hanging over his head., which was a benefit to Appellant.

The case of United States v. Robinson, 47 M.J. 506 (N-M Ct. Crim. App. 1997) is instructive. In Robinson, the Navy-Marine Corps Court held that the speedy trial clock did not reset when the government dismissed charges on the 115th chargeable day, and re-preferred a mere 5 days later. Id. at 511. The Court found that dismissal was for the **"sole** purpose of avoiding the 120-day rule" and the accused had no real change in legal status in the 5 days between dismissal and repreferral. Id. (emphasis added). It noted that although the government said dismissal was necessary to obtain additional evidence, "no additional evidence was actually gathered during the 5-day period between dismissal and reprefferal." Id. at 509. And while the government claimed dismissal was required to amend the charge sheet, the new charges were not significantly different from the original ones. Id. Yet, the Court still maintained that its holding in Robinson was "intended to be very narrow in scope, and limited to the unique facts of this case."

In contrast to Robinson, the government here had a legitimate reason, that would have otherwise been an excludable delay, for dismissing the charges– seeking Secretary approval to preserve the option of confinement for Appellant's sex crimes. Unlike in Robinson, the government did substantiate the purported reasons for dismissal – they actually sought and gained Secretary approval during the 10 months between dismissal and repreferral. (Plus, Appellant had 10 whole months – not a mere 5 days – without charges hanging over his head.) Thus, dismissal

was not for the **sole** purpose of evading the speedy trial clock, and dismissal correctly reset the speedy trial clock.

Appellant argues (App. Br. at 8) the Staff Judge Advocate's 19 January 2021 Legal Review, para. 4.c, which noted that dismissal and repreferral would re-start the speedy trial clock, demonstrated subterfuge. To the contrary, it was merely a correct statement of the law and R.C.M. 707.

In summary, the government abided by R.C.M. 707 when it dismissed and repreferred charges against Appellant in order to seek Secretary approval for his recall for court-martial. There was no violation of the R.C.M. 707 speedy trial clock, and Appellant is not entitled to relief.

2. Sixth Amendment Analysis

The military judge's denial of Appellant's motion to dismiss on Sixth Amendment grounds was also supported by the record and applicable law.

Because the delay from the second preferral to trial, excluding delays because of defense unavailability, was only 103 days, it was facially unreasonable. Appellant cites the unpublished opinion in United States v. Arma, ACM 2014-09, 2014 CCA LEXIS 802 (A.F. Ct. Crim. App. 22 Oct. 2014) (unpub. op.), for the proposition that the R.C.M. 707 standard of 120 days is not directly applicable, but is still useful, in Sixth Amendment analysis. Id. at *14. The Arma Court found a delay of 260 days was facially unreasonable, triggering an analysis of the other three Barker factors. Id. However, despite the 69-day delay in the government producing polygraph materials to the defense, the Court ultimately found there was no Sixth Amendment Speedy Trial violation, because there was no impairment of his defense. Id. at *16, *19. Importantly, the delay in Appellant's instant case was less than 120 days, so Arma supports the government's position in this case, and no further Barker analysis is triggered. Danylo, 73M.J. at 186.

Appellant also cites to United States v. Painter, ACM 39646, 2020 CCA LEXIS 474 (A.F. Ct. Crim. App. 23 Dec. 2020) (also involving an accused who was sleeping over with others after a party, who rubbed victim's vagina while she was asleep) (unpub. op.), which also supports the government's position, because, despite a facially unreasonable delay of 178 days (id. at *72), the Court found no Sixth Amendment violation was found. Id. at *78.

Even if the Court were to review the remaining Barker factors, no Sixth Amendment speedy trial violation exists. Although the military judge found the reason for the delay "slightly in favor of the Defense" (App. Ex. XXIII, para. 29.b), just over two months from preferral to the government ready date is far from unreasonable, and approximately one month from the defense ready date to trial is quite reasonable.

While Appellant did make three speedy trial demands, including soon after the first preferral of charges, the defense was not ready for trial until less than one month before trial actually commenced, so the military judge found the third factor only weighed "slightly in favor of the Defense." (App. Ex. XXIII, para. 29.c.)

Importantly, there was no prejudice related to Appellant's court-martial. Appellant cited personal reasons in support of his argument of prejudice; however, as the military judge noted, Appellant was not in pretrial confinement, and his personal circumstances were unrelated to the court-martial delays. In United States v. Danylo, 73 M.J. at 185, 189, the appellant was in pretrial confinement for 116 days and then restricted to base for 123 days, and the military judge dismissed the case with prejudice. The government appealed, this Court granted the appeal, the appellant was convicted at court-martial. Id. at 185. The CAAF rejected the appellant's arguments that he was prejudiced because he served two months of pretrial confinement beyond his adjudged sentence due to pretrial delays, and that his confinement conditions cause him particularized

anxiety and concern. Id. at 188. In the instant case, when not attending legal proceedings, Appellant was in civilian status.

In arguing his anxiety from his child custody situation[4] and his lack of pay from his missed annual tour, Appellant cites to United States v. Wilson, 72 M.J. 347 (C.A.A.F. 2013). However, Wilson involved 140 days from when Wilson was placed in pretrial confinement to his arraignment (and 174 days to trial), and the first 36 days of which no charges had been preferred. Id. at 349. The environment was described, in surprisingly mild terms given the facts, as "racially tense." Id. at 354. The Court in Wilson implied that even ordinary pretrial confinement was not sufficient to establish this factor weighs in an accused's favor; that is, the Court is concerned if there is "some degree of particularized anxiety and concern greater than the normal anxiety and concern associated with pretrial confinement." Id. Ultimately, the Court found that any anxiety or concern Wilson suffered was the result of normal incidents of confinement. Id. Certainly, Appellant's circumstances were far less anxiety-provoking that Wilson's, since Appellant was not confined.

Pretrial, Appellant also argued the delay prejudiced his ability to obtain additional video evidence from TSgt V.A.'s residence and witness testimony. App. Ex. X, pp. 19-20, para. 57.b. The military judge pointed out that delays did not impact availability of the video evidence, which became unavailable "long before any significant delay occurred in this case," and there was no showing that any such evidence would have contained anything of value to Appellant's case. App. Ex. XXIII, pp. 8-9, para. 29.d(iii). Regarding witnesses, the military judge noted, "A number of witnesses had been interviewed . . ., each has recalled various interactions between the alleged

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[4] Appellant initially offered a memorandum to describe this child custody situation but withdrew it. *See* App. Ex. XXIII, p. 8, n. 5.

victim and [Appellant] . . ., and these witnesses are available to testify. . . ." Id. The delay was not long and unlikely to have been the cause of any loss of recollection, as opposed to normal witness failure when perceiving stressful events. Appellant has failed to meet his burden to show specifically that the delay caused any memory loss. Danylo, 73 M.J. at 189 (An appellant bears the burden of establishing prejudice from an alleged speedy trial delay). Moreover, the defense was able to impeach the witnesses' inculpatory/incriminating testimony with the fact that they had minor areas in which they had incomplete recollection.

3. Conclusion regarding Speedy Trial

The GCMCA reasonably dismissed the Charge and its Specifications to seek SecAF approval for recalling Appellant to duty, so he could reprefer them and preserve the possibility of Appellant receiving confinement as part of a post-conviction sentence. The non-excludable delays were less than 120 days, which is facially reasonable, so no further inquiry under R.C.M. 707 or the Sixth Amendment is necessary. However, even if the Court conducts further Sixth Amendment inquiry, the reason for the delay and Appellant's speedy trial demands only weighs slightly in his favor, and there is no prejudice to Appellant's court-martial based on the delay. For the foregoing reasons, the military judge correctly denied Appellant's speedy trial motion, and this Honorable Court should affirm that ruling.

II.

THE GENERAL COURT-MARTIAL HAD JURISDICITON OVER APPELLANT WHEN HE COMMITTED HIS CRIMES THE EVENING BETWEEN TWO CONSECUTIVE DAYS OF INACTIVE DUTY FOR TRAINING, HE WAS IN DUTY STATUS FOR THE PRELIMINARY HEARING, AND THE ORDERS TO RECALL HIM TO ACTIVE DUTY WERE LAWFULLY ISSUED.

Additional Facts

1. Testimony regarding UTA weekend IDTs

In the pretrial motion hearing on Appellant's motion to dismiss, the government called Lt Col W.L., Squadron Commander since March 2020, to testify. (R. at 52). Lt Col W.L. testified as follows: She oversees approximately 250 reservists and is familiar with their yearly requirements, including monthly unit training assembly (UTA) one weekend per month, plus two weeks of annual tour per year. (R. at 54.) UTA is comprised of "inactive duty training" (IDT) or a "drill weekend." (Id.) Annual UTAs are scheduled out six months to one year before the fiscal year. (Id.)

Lt Col W.L. explained Appellant's UTAPS calendar of annual IDTs. (App. Ex. XVI; R. at 55-56.) On 7 and 8 December 2019, the UTAPS calendar has those dates in black, indicating Appellant performed duty and received pay. Id. at 56. Lt Col W.L. explained Appellant's Form 40a. (App. Ex. XVII; R. at 56-57.) She then explained the 26-page export of the unit members' Forms 40a. (App. Ex. XVIII; R. at 58.) Administrative discrepancies are resolved after the UTA weekend, if members need to be excused or rescheduled; however, Appellant was paid for all four IDT points/periods for 7 and 8 December. (R. at 59.)

When asked, "Would it be common if someone does not show up to keep them on orders? Lt Col W.L. responded:

> So, it depends on the circumstances. We have had airmen — normally it's no surprise, but first line supervisors or their flight leadership, they've acknowledged that the Airmen had no challenge that morning. With the COVID pandemic, maybe they've gotten sick, maybe we're having suicidal ideations or some sort of crises that needs to be addressed. So, in those special case scenarios, we do keep members in status to ensure that they have access to resources.

(R. at 59.)

Lt Col W.L. discussed Appellant's leave and earning statement (LES), showing he received pay for 7 and 8 December 2019. (R. at 60.)

During cross-examination, Lt Col W.L. testified Appellant was an Air Reserve Technician. (R. at 62.) When confronted with whether pay documents show Appellant's military status on the days in question, she responded, "But you get paid when you're in a status. So, I'm not going to be in a status and not get paid for it, and I wouldn't be paid militarily if I was not in a military status. (R. at 64-65.) When asked, "And so, after a reservist signs out, say for a Saturday, are they still subject to recall that Saturday night or Sunday morning before they sign in?" Lt Col W.L. responded, "Correct, they're still considered in the umbrella of status for coverage, yes." Lt Col W.L. spoke with senior enlisted leader, CMSgt C , who was present with the unit at the time of the crimes, and he confirmed Appellant was "in (military) status." (R. at 68-69.)

Appellant concedes, "Here, there is no dispute that SSgt Taylor performed IDT on 7 December 2019 and was scheduled to perform IDT on 8 December 2019." (App. Br. at 15)

During the motions hearing, the military judge asked, "The reason that somebody went to stay with him and watch him was because the allegation had come out between the 7th and the 8th?" Defense counsel confirmed, "Yes, Your Honor." The military judge sought clarification, "[I]s it agreed upon between the parties that the reason that the accused did not actually go in and perform duty on the 8th is because the unit kept him home after the allegation came out, and kept somebody there with him to keep an eye on him because of concerns about his safety? Both parties agree that that's what occurred?" Defense counsel again confirmed, "Yes, Your Honor." (R. at 89-90.)

2 . GCMCA's Orders Recalling Appellant for Preliminary Hearing and Trial

In multiple memoranda, the GCMCA, Maj Gen Koscheski, 15 AF/CC, ordered Appellant to duty for purposes of the court-martial:

- Memorandum from 15 AF/CC, dated 30 August 2021, subject "Recall to Active Duty for Court-Martial," stated, "I order the recall to active duty of [Appellant] for the purpose of disciplinary action. Authority is granted to release [Appellant] from active duty subsequent to any investigation under Article 32, UCMJ, and to recall him again for trial if the charges are referred to court-martial." (ROT Vol 4.)
- DM MFR-001, dated 19 October 2021, ordered him to duty on 20 October 2021. (App. Ex. X, Attachment 16.)
- DM MFR-002, dated 19 November 2021, ordered him to duty on 22 November 2021 for referral of charges. (Id., Attachment 19.)
- DM MFR-003, undated, ordered him to duty on for 21 March 2022 to 22 March 2022 pursuant to 10 U.S.C. 802(d) for the purpose of arraignment and motions. (App. Ex. V.)
- DM MFR-004, dated 16 June 2022, ordered him to duty from 26 June 2022 through 2 July 2022 for trial by court-martial. (App. Ex. XXX.)
- DM MFR-005, dated 28 June 2022, ordered him to duty from 26 June 2022 through 2 July 2022, and to any adjudged confinement, for trial by court-martial. (App. Ex. XXXV.)

Appellant was on IDTs during the preliminary hearing on 25 September 2020, which date was arranged as a rescheduling of Appellant's ordinary drill weekend to accommodate a weekday for his civilian defense counsel's schedule. (App. Ex. X, Attachments 7 and 28; App. Ex. XVI.)

Appellant was on IDTs on the trial dates 22 March 2022 and 27-29 June 2022, pursuant to Maj Gen Koscheski's orders in "DM MFR-003," "DM MFR-004," and "DM MFR-005." (App. Ex. V, XXX, and XXXV.)

3. Military Judge's Ruling on Personal Jurisdiction

In the military judge's Ruling on the defense claim of a lack of personal jurisdiction to prosecute Appellant and improper recall to active duty, he found, among other things: Appellant was a member of the Air Force Reserve on the dates of the alleged crimes; Appellant's unit

typically forecast unit training weekend schedules six months to a year in advance, members of the unit are required to attend said weekends using inactive duty training days; completion of IDTs is documented in the Unit Training Assembly Participation System (UTAPS); a member must be in duty status to receive pay and points for completion of IDTs, and on 7 and 8 December 2019; Appellant was scheduled to perform, and did perform, two IDT days, which were documented in various documents and system. (App. Ex. XXIX, paras. 4-12.) He found that, on 8 December 2019, Appellant did not physically report to his place of work, because his unit allowed him to remain home, with another unit observing him, out of concern for his mental well-being and safety. (Id, para. 13.) The military judge concluded his analysis:

> Authorizing a member to remain outside of the work center, with another unit member, because of such concerns, does not change a member's duty status and is an appropriate command response to the circumstances at the time. The Accused was still in an inactive-duty training status on 8 December 2019, notwithstanding his unit's decision to allow him to remain home with another unit member.

(Id., para. 25.)

Regarding arraignment on 21 and 22 March 2022, the military judge found Maj Gen Michael Koscheski, 15 AF/CC, a general court-martial convening authority, had involuntarily recalled Appellant to active duty for arraignment and motions in this case. (Id. para. 14.)

Standard of Review

This Honorable Court conducts a de novo review of jurisdiction questions. United States v. Hale, 78 M.J. 268, 270 (C.A.A.F. 2019) (internal citation omitted). When challenged, the government must prove jurisdiction by a preponderance of evidence. Id. (citing United States v. Morita, 74 M.J. 116, 121 (C.A.A.F. 2015)).

Law

"An inquiry into court-martial jurisdiction focuses on ... whether the person is subject to the UCMJ at the time of the offense." Hale, 78 M.J. at 271 (quoting United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012)).

In 2016, Article 2(a)(3), UCMJ, was amended to add that the following persons are subject to the jurisdiction of the Code:

> (A) While on inactive-duty training and during any of the periods specified in subparagraph (B)—
>
> (i) members of a reserve component . . .
>
> (B) The periods referred to in subparagraph (A) are the following:
>
> (i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.
>
> (ii) Intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations.
>
> (iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.

National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2921 (2016).[5]

Analysis

1. Personal Jurisdiction during the Crimes while on IDTs for UTA Weekend

Appellant asserts he was not subject to the UCMJ when he committed his crime on 7 December. (App. Br. at 15-18.) He states that, after being confronted with his criminal conduct that same day, he was upset that he had "messed up," so his leadership allowed him to stay home with at least one other member of his unit for his own well-being. Therefore, he argues, he did not "perform duty" the next day, so jurisdiction ceased after signing out from duty on 7 December, before his crimes. *See e.g.*, (App. Ex. XXIX, p.2.)

[5] These changes to Article 2(a) went into effect in January 2019 (first day of the first calendar month that begins no later than two years after the NDAA date of enactment). *Id.* § 5542.

Appellant's emphasis on "performing duty" is misplaced. The reason he was subject to the jurisdiction of the UCMJ is that he was in military status to perform scheduled IDTs during his UTA weekend, and that status did not terminate. His commander directed he stay at home as his place of duty for his own safety and had other members of the unit attend to him at his home to ensure the same. Appellant was never excused from duty on 8 December 2023. Appellant received pay and retirement points for 8 December 2019, because, as Lt Col W.L. testified, he was in a duty status.

Air Force Manual (AFMAN) 36-2136, *Reserve Personnel Participation* (6 Sep. 2019),[6] defines UTA as a type of IDTs with "[t]wo or more consecutive Inactive Duty Training periods scheduled by a unit (preferably during a non-holiday weekend) for an assembly of Airmen to get training." Thus, the scheduling of IDTs by Appellant's unit on 7 and 8 December 2019 was "pursuant to . . . regulations" as required by Article 2(a)(3)(B)(iii).

Appellant's situation is one of the three situations that led Congress to amend Article 2 in the 2016 National Defense Authorization Act (NDAA). 114 P.L. 328, 130 Stat. 2000, 2016 Enacted S. 2943, 114 Enacted S. 2943.[7] Congress took action to close loopholes in military jurisdiction. As an example of such a loophole, in United States v. Wolpert, 75 M.J. 777 (A. Ct. Crim. App. 2016), the Army Court of Criminal Appeals concluded the Army did not have personal jurisdiction under the UCMJ to try charges that were preferred against a member of a reserve

[6] This publication has since been superseded by Department of the Air Force Manual (DAFMAN) 36-2136, *Reserve Personnel Participation*, dated 15 December 2023.

[7] In the 2016 NDAA, Congress also clarified Article 2 to close two other loopholes. Jurisdiction exists over crimes committed while traveling to or from IDTs, Article 2(a)(3)(B)(i), and jurisdiction exists over crimes committed during the lunch break between two consecutive periods of IDTs on the same day. Article 2(a)(3)(B)(ii). *See, e.g.,* United States v. Phillips, 58 M.J. 217, 220 (C.A.A.F. 2003) (concluding jurisdiction over reservist did cover travel day prior to her reporting for active duty).

component who allegedly sexually assaulted an enlisted soldier in his unit at a motel where unit members were housed on the Saturday night in the middle of a UTA weekend when the unit was performing inactive-duty training. Id. at 781.

On 22 December 2015, the Military Justice Review Group (MJRG), led by Senior Judge Andrew S. Effron, submitted its UCMJ Recommendations. REPORT OF THE MILITARY JUSTICE REVIEW GROUP 153-56 (22 Dec. 2015). https://ogc.osd.mil/Portals/99/report_part1.pdf.

As the MJRG noted regarding contemporary practice:

> Although Article 2(a)(3) provides a basis for personal jurisdiction over reservists performing inactive-duty training (IDT) in certain circumstances, jurisdictional gaps remain: misconduct by a reserve component member carried out while en route from their home to their IDT drill site, or while berthed in military housing or contract commercial berthing, or during periods in between successive IDTs (i.e. meal breaks and Saturday evenings), or while en route from the IDT site to their home typically all fall outside of UCMJ jurisdiction under current law. Misconduct that occurs during the periods described above, which, for example, could include driving under the influence, damage to government quarters, or a crime of violence, has the potential to negatively affect good order and discipline in the armed forces.

Id. at 154.

The MJRG recommended:

- Under the present interpretation of Article 2(a)(3), UCMJ jurisdiction over reserve component members performing inactive-duty training typically applies only during individual four-hour drill periods. A clarification in the law is needed to ensure that UCMJ jurisdiction applies to misconduct committed by an individual ordered to inactive-duty training throughout the drill period, including after working hours.
- The proposed amendments to Article 2 would enhance good order and discipline in the reserve components of the armed forces by giving commanders better disciplinary options to address misconduct that takes place incident to periods of Inactive-Duty Training.

Id. at 155.

In United States v. Hale, Judge Ohlson started his opinion, in which he concurred in part and dissented in part, by noting:

> Thankfully, the jurisdictional puzzle confounding the Court in the instant case soon will be sorted out. The Military Justice Review Group (MJRG), which was so ably chaired by Senior Judge Andrew Effron, recognized the vagaries inherent in a system whereby jurisdiction over reservists performing inactive duty training (IDT) could—like an office light switch—turn on and off several times during the course of a single work day. *See* Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group 154-55 (Dec. 22, 2015), http://ogc.osd.mil/mjrg.html. Therefore, upon the MJRG's recommendation, Congress amended Article 2(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(3), so as to eliminate jurisdictional gaps that previously arose within the interstices of blocks of time dedicated to inactive duty training. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894-95 (2016). Thus, some much needed rationality is now in the process of being imposed regarding court-martial jurisdiction over reservists.

United States v. Hale, 78 M.J. 268, 275-76 (C.A.A.F. 2019) (concurring in part and dissenting in part).

The military judge found as fact that Appellant performed IDT periods on 8 December 2019, and that he was paid for them. App. Ex. XXIX, paras. 9, 10, 12, 24, and 25. This finding of fact was supported by the testimony of Lt Col W.L. and the PCARS report (App. Ex. X, Attachment 28, p. 2), UTAPS calendar (App. Ex. XVI), AF Form 40a for 7 and 8 December 2019 (App. Ex. XVII), Export of Forms 40a (App. Ex. XVIII, p. 11), and December 2019 LES (App. Ex. XIX), and was not clearly erroneous. Because Appellant was in the middle of his scheduled UTA drill weekend – which was scheduled pursuant to Air Force regulations – and he committed his crimes between two consecutive days of scheduled IDTs, he was subject to UCMJ jurisdiction regardless of whether he performed the administrative function of signing in or he received

direction to be on duty at Davis-Monthan Air Force Base or at home. Appellant's claims he was paid for the 8 December 2019 IDT points in error. (App. Br. at 17.) However, all the aforementioned documents, and Lt Col W.L.'s testimony disprove that. Lt Col W.L. testified that, if a member does not show up for IDTs, the unit has discretion to keep the member in status or to excuse them. (R. at 59-60. See AFMAN 36-2136, para. 4.7 ("Unit Commanders may reschedule Inactive Duty Training for the entire unit, team, or an individual reservist. Commanders should use discretion and sound judgment in employing this option.").) Appellant concedes this point. (App. Br. at 17) (citing AFMAN 36-2136, para. 4.7.1). In this case, the unit intentionally authorized Appellant to remain at his home, kept him in status, had another member of the unit stay with him,[8] and did not excuse him from the IDTs, resulting in his receiving pay.

Appellant's argument -- that there would have been jurisdiction if he had been located, after his crime, on base during his 8 December 2019 IDTs, but there was no jurisdiction because the unit directed him to stay at home during the IDTs – is clearly contrary to the plain wording of the statute and contrary to the purpose of the statutory change in the 2017 NDAA. Since Appellant was in a duty status on 8 December, he was subject to Air Force jurisdiction when he committed his misconduct in between his scheduled IDTs on 7 and 8 December.

2. Jurisdiction for Preliminary Hearing and Trial by Court-Martial

Defense also argued the court lacked personal jurisdiction for arraignment and trial. (App. Ex. X; R. at 14–15.) The government opposed this motion. (App. Ex. XI.) After receiving additional information regarding jurisdiction that he ordered the government to produce (App. Exs.

[8] One would not likely contest whether this other unit member was in a duty status when he reported to an off-base location on a scheduled IDT day at the behest of his commander. The same goes for Appellant, who was ordered to an off-base location for his scheduled IDT day.

XXV, XXVI), the military judge found there was UCMJ jurisdiction over SSgt Taylor both at the time of the alleged offense and for trial. (App. Ex. XXIX.)

Appellant was in military status on IDTs, and received pay, for his 25 September 2020 preliminary hearing pursuant to Article 32, UCMJ. (App. Ex. X, Attachment 28, p. 2; App. Ex. XVI).

Maj Gen Koscheski's "DM MFR-003" ordered Appellant to duty for 21 March 2022 to 22 March 2022 pursuant to 10 U.S.C. 802(d) for the purpose of arraignment and motions. (App. Ex. V.) And Maj Gen Koscheski's 28 June 2022 "DM MFR-005" ordered Appellant to duty from 26 June 2022 through 2 July 2022, and to any adjudged confinement, for trial by court-martial. (App. Ex. XXXV.)

Article 2(a)(3) establishes that reserve members are subject to the UCMJ while they are serving IDT days. If Appellant was on IDTs for his preliminary hearing, arraignment, and court-martial, then he was subject to the code during those times, and the court-martial had jurisdiction to try him.

Appellant argues (App. Br. at 18) that the Discussion accompanying R.C.M. 204(a) specifies that service "regulations should describe procedures for ordering a reservist to active duty for disciplinary action, preferral of charges, preliminary hearings, forwarding of charges, referral of charges, designation of convening authorities and commanders authorized to conduct nonjudicial punishment proceedings, and for other appropriate purposes." However, the Discussion next states, "See definitions in R.C.M. 103 (Discussion). See paragraph 5.e and f., Part V, concerning limitations on nonjudicial punishments imposed on reservists while on inactive-duty training." It does not express limitations on actions other than nonjudicial punishments when on IDTs; therefore, no such limitation exists. Moreover, the Discussion uses "should" and does

not mandate the use of active duty orders instead of IDTs. Finally, the Discussion in the Rules for Court-Martial are not binding in any event. United States v. Chandler, 80 M.J. 425, 429 n.2 (C.A.A.F. 2021).

Appellant notes that, after the GCMCA ordered Appellant to duty in his MFRs, administrative personnel did not issue an AF Form 938, *Request and Authorization for Active Duty Training/Active Tour*. However, it was not standard operating procedure for the Military Personnel Flight to do so. (App. Ex. XXVII; R. at 107.) After all, the AF Form 938 is a "Request and Authorization for *Active* Duty Training/*Active* Duty Tour," not *inactive* duty training. Moreover, administrative errors in orders do not divest a court-martial of personal jurisdiction. *See* United States v. Ferrando, 77 M.J. 506 (A.F. Ct. Crim. App. 2017) (holding erroneous citation to 10 U.S.C. § 12301(d) in reservist appellant's orders was an administrative error, but clearly intended to recall Appellant to active duty for court-martial pursuant to the GCMCA's directive and the Secretary's approval); United States v. O'Connor, ACM 38420, 2015 CCA LEXIS 47, at *11 (A.F. Ct. Crim. App. 12 Feb. 2015) (unpub. op.) (same); United States v. Toro, No. 2013-23, 2013 CCA LEXIS 852 (A.F. Ct. Crim. App. 1 Oct. 2013) (unpub. op.) (same). As this Court more recently explained in United States v. Lull, ACM 39555, 2020 CCA LEXIS 301 (A.F. Ct. Crim. App. 2 Sep. 2020), "[The Court is] unwilling to hold that an apparent mistake on Appellant's AF Form 938 in carrying out the otherwise clear intent of senior Air Force officials to properly recall Appellant to active duty warrants a conclusion that jurisdiction is lacking." Id. at *21. What matters is whether the GCMCA ordered Appellant to active duty, which he did. (See App. Ex. V, XXX, and XXXV.)

In conclusion, the GCMCA properly ordered Appellant, with SecAF approval, to duty for the preliminary hearing and trial. Since there was jurisdiction over Appellant both at the time he

committed his misconduct and for his preliminary hearing and trial, this Court should deny this assignment of error.

III.

THE SPECIFICATIONS ARE LEGALLY SUFFICIENT BECAUSE THEY ALLEGE APPELLANT'S MILITARY STATUS, WHICH FORMS A BASIS FOR JURISDICTION.

Standard of Review

A claim that a charge is defective because it fails to allege an element of an offense is, if not raised at trial, tested for plain error. United States v. Cotton, 535 U.S. 625, 631–32 (2002). For a plain error analysis, the accused must demonstrate that "(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused." Girouard, 70 M.J. at 11.

Lack of jurisdiction may be raised for the first time on appeal. United States v. Reid, 46 M.J. 236, 240 (1997). Doing so permits this Court to employ its fact-finding authority under Article 66, UCMJ. Lull, 2020 CCA LEXIS at 13 (citing United States v. Cendejas, 62 M.J. 334, 338 (C.A.A.F. 2006)).

Law

R.C.M. 307(c)(3) states:

> *Specification*. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134 must expressly allege the terminal element. Except for aggravating factors under R.C.M. 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

The Discussion to R.C.M. 307(c)(3) states:

> *Persons subject to the UCMJ under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4*. The specification should describe the accused's armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

Analysis

Appellant challenges, for the first time on appeal, the wording of the Specifications in his Charge Sheet. (App. Br. at 21-24.) However, the Specifications comply precisely with R.C.M. 307. They allege his armed force ("United States Air Force"), unit ("

Squadron"), and position ("Staff Sergeant"). ROT, Vol. 1.[9] Appellant's argument on this assignment of error hinges upon their incorrect assumption and argument raised in earlier assignments of error that Appellant was not subject to the UCMJ at the time of the offenses. (App. Br. at 22.) Moreover, Appellant conflates an alleged error under the Rules for Court-Martial with an alleged jurisdictional defect. Jurisdiction is not an element of an offense that must be proven before the fact-finder; rather it is an interlocutory issue to be decided by a military judge. United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

In Lull, this Court found the appellant's status sufficiently worded in the Charge Sheet, when it identified his reserve unit of assignment, as well as the unit to which the appellant was assigned on orders. 2020 CCA LEXIS at *16.[10] In Appellant's case, he was an Air Reserve Technician who was assigned to his reserve unit of assignment when he committed his crimes.

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[9] "The specification should describe the accused's armed force, unit or organization, position, or status which will indicate the basis of jurisdiction." R.C.M. 307(c)(3), Discussion (C)(iv)(b).

[10] The Court in Lull also noted "an additional basis to find jurisdiction: Appellant received pay and allowances for performing military duties. . . ." Id. at *15, n.13.

The Specifications identified Appellant's unit and his rank. Thus, the Charge Sheet sufficiently identified the basis for jurisdiction over Appellant.

The Court in Lull was clear in rejecting the appellant's argument that Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 2.14.2 (8 Dec. 2017), which states "trial counsel must introduce sufficient evidence to establish in-personam jurisdiction over the accused at the time of the offense," requires proof *at trial* that Appellant was on active duty at the time of the offenses. 2020 CCA LEXIS at *16-17. The Lull opinion continued, "Appellant made no similar claim at trial, and the argument that the language of AFI 51-201 creates a legal requirement to prove jurisdiction at trial, even when there is no challenge, is no more persuasive now than it was when this court rejected it in United States v. Gardner, ACM 30091, 2003 CCA LEXIS 198 (A.F. Ct. Crim. App. 27 Mar. 2003) (per curiam) (unpub. op.), *rev. denied*, 59 M.J. 116 (C.A.A.F. 2003).

The Court in Gardner stated:

> The appellant's argument that the language of AFI 51-201, P 8.4, creates an affirmative requirement to present such evidence, even when there is no objection at trial, is not persuasive. From its context, the language of the instruction is advisory—there is no indication it was intended to create a new element for offenses committed by reservists beyond those defined by Congress in the UCMJ, or detailed by the President in the *Manual for Courts-Martial*. There is nothing to indicate that the instruction was intended to create some additional substantive right for an accused, such that a failure to follow the instruction's guidance would generate grounds for appellate relief.

2003 CCA LEXIS at *4-5.

Appellant cites to United States v. Girouard, 70 M.J. 5, 11–12 (C.A.A.F. 2011), and United States v. Fosler, 70 M.J. 225, 229, 233 (C.A.A.F. 2011). (App. Br. at 23.) However, Girouard involved conviction for an offense that was not a lesser included offense of the charged offense

and Fosler involved a failure to allege the terminal element of Article 134 (Fosler). Thus, those two cases involved evidence missing to prove elements of the offense of conviction. In Appellant's case, all elements were proven beyond a reasonable doubt. Thus, this Court should reject his assignment of error.

IV.

THE FINDINGS OF GUILTY ARE LEGALLY SUFFICIENT BECAUSE JURISDICTION IS NOT AN ELEMENT OF AN OFFENSE UNDER THE UCMJ.

Standard of Review

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

Law

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Robinson, 77 M.J. 294, 297–98 (C.A.A.F. 2018).

Analysis

Appellant argues that, although there was pretrial extensive litigation regarding UCMJ jurisdiction, "none of the evidence admitted at trial proved the basis for jurisdiction." However, as addressed above in this Answer, jurisdiction is not an element of offenses. Oliver, 57 M.J. at 172.

Even if jurisdiction did have to be proven during trial, eight witnesses, including Appellant, testified that Appellant was a member of the Squadron and present for the drill weekend. The following are a few such references:

- A.G. testified she is a crew chief in the (Aircraft Maintenance Squadron) and she knew "Sergeant Taylor" from work "at the th." (R. at 122, 123-24.) She was asked if she and Appellant were both at drill weekend and "on active duty" the weekend of 7 and 8 December 2019, and she replied, "Yes."

- TSgt V.A. testified she and Appellant, "Staff Sergeant James Taylor," were assigned to the same unit. (R. at 150.) When asked if she knew if "Sergeant Taylor" was on orders the weekend of 7 to 8 December 2019, TSgt V.A. answered, "Yes." (R. at 151).

- MSgt B.S. testified he and "Sergeant Taylor" were in the same unit and they spoke on 8 December 2019. (R. at 202.)

- CMSgt S.G. testified he met Appellant in the early morning hours of 8 December 2019, because he received a call about the crimes at issue and he was Appellant's first sergeant. (R. at 213.)

- SSgt C.G. testified he was in the Squadron with "Staff Sergeant James Taylor." (R. at 217.)

- SSgt D.W. testified he and Sergeant Taylor worked together. (R. at 234.)

- TSgt M.A. testified she knew "Sergeant Taylor" from work at the h (Squadron). (R. at 244.)

- Appellant testified and identified himself as "Staff Sergeant James L. Taylor, Junior." (R. at 272).

In this assignment of error, Appellant again refuses to acknowledge the core holdings in Gardner and Lull – that DAFI 51-201 does not create new elements for offenses committed by reservist -- and he yet again argues about "active duty" when the issue is one of being in military status, whether active duty, inactive duty for training, or otherwise.

In summary, after considering the evidence in the light most favorable to the prosecution, there was legally sufficient evidence for a reasonable trier of fact, such as the military judge in this case, to have found Appellant guilty beyond a reasonable doubt.

V.

THE FINDINGS OF GUILTY ARE FACTUALLY SUFFICIENT BECAUSE THE EVIDENCE PROVES

APPELLANT REASONABLY SHOULD HAVE KNOWN A.G. WAS ASLEEP.

Standard of Review

This Court reviews issues of factual sufficiency de novo. Washington, 57 M.J. at 399.

Law

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the [appellant]'s guilt beyond a reasonable doubt. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal citation omitted).

Analysis

In this case, the United States proved beyond a reasonable doubt that Appellant should have known A.G. was asleep when he committed his crime against her in the early morning after a long night of parties and drinking.

A.G. described the assaults happening while she was asleep. (R. at 131, 136, 138, 144.) Moreover, several other witnesses corroborated A.G.'s prompt reporting of Appellant assaulting her while she was asleep:

- TSgt V.A. (R. at 161 ("[A.G.] was calling because she sounded very scared, and she was crying, and driving back home, and to tell me that she woke up to [Appellant] on her and touching her"))
- Ms. G.F. (R. at 187 ("She was like, ". . . I (A.G.) just woke up and he (Appellant) was on top of me."))
- TSgt M.A. (R. at 245 ("[S]he (A.G.) went to lie down and she woke up, [Appellant] was there." "Fingers in her, is what she (A.G.) said."))
- SMSgt P.T. (R. at 249, 251 ("But I do remember her (A.G.) saying that she woke up and he (Appellant) was touching her vagina." "She (A.G.) told me that she woke up and he (Appellant) was touching her."))

Appellant was not under a mistaken belief that his sleeping victim was awake, and any such mistake would have been unreasonable under the circumstances. Appellant and A.G.

had never dated, kissed, or discussed doing so. To the contrary, A.G. slept separately in a locked room. Hours after she went to sleep in a separate bedroom alone, he went into her room at 0400 hours, got onto her bed, and, without any discussion, inserted his finger into her vagina.

Appellant's Brief continues to assert his debunked assertion, relying on a self-serving hearsay statement his friend MSgt B.S. testified he heard from Appellant (R. at 209), that he (Appellant) had gone to A.G.'s bedroom door, asked if he could sleep with her, and she responded in the affirmative (R. at 274). In A.G.'s testimony, she rejected attempts during the defense's cross-examination in which they asked if she recalled permitting Appellant to get into bed with her or telling others she permitted him to do so. (R. at 144-45, 257, 266.) Moreover, TSgt M.A. and MSgt P.T., who were present when A.G. spoke with MSgt B.S., did not recall A.G. saying she invited Appellant into her bed. (R. at 245, 249.)

Finally, Appellant's own incriminating statements right after his crime demonstrate his consciousness of guilt. In Prosecution Exhibit 3, Attachment 1a, when TSgt V.A. asked him why he touched A.G., he replied that he was drunk (not that A.G. had invited him to her bed or consented to being touched), and he acknowledged he "fucked up." In Prosecution Exhibit 3, Attachment 1d, during a conversation with TSgt V.A., Appellant repeatedly admitted that he "fucked up," he "honestly did not mean to do that," he was "fucking drinking," and he was "absolutely sorry" he "did that to her." As MSgt B.S. testified, Appellant kept saying he was sorry, he apologized, and he had messed up when he touched A.G. As CMSgt S.G. testified, Appellant kept saying he messed up and he couldn't believe it, and Appellant said, "Holy shit, what did I do?" As SSgt C.G. testified after being impeach, Appellant told him he (Appellant) was very sorry for having "fingered" A.G. Similarly, SSgt D.W. testified Appellant told him he (Appellant) had "fingered her and he felt like crap." If the series of events had happened in the

way Appellant described during his in-trial testimony, i.e., A.G. acquiesced to Appellant laying in her bed and moved her hips around his pelvis and was moaning with pleasure, there would have been no reason for Appellant to be so remorseful immediately after the incident. Thus, the consciousness of guilt evidence also tended to establish that Appellant's trial testimony was untruthful. And if Appellant's trial testimony and self-serving statements to MSgt B.S. are discounted, there was no other evidence in the record to establish that A.G. was actually awake at the beginning of the sexual assault.

Although this Court conducts a de novo review, the military judge personally observed the witnesses' and Appellant's sworn testimony in making his finding of guilt beyond a reasonable doubt. Although there is strong corroborating evidence in the form of the home surveillance videos, the case largely depended on the testimony of several witnesses. Thus, deferential "allowances" must be given to the military judge's evaluation of their credibility.

After reviewing all the evidence, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. It should therefore reject this assignment of error.

CONCLUSION

The United States respectfully requests this Honorable Court deny the relief Appellant requests and, instead, affirm the findings and sentence.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 29 January 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
James L. TAYLOR, Jr.	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 31st day of January, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

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

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MERRIAM, ERIC P., Colonel, Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40371 5 February 2024

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

Appellant, Staff Sergeant (SSgt) James L. Taylor, Jr., pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Government's Answer, dated 29 January 2024. In addition to the arguments in his opening brief, filed on 28 December 2023, SSgt Taylor submits the following arguments for the issues listed below.

I.

The government violated SSgt Taylor's right to a speedy trial because the dismissal of the Charge was a subterfuge to avoid a speedy trial violation, and the extensive period of delay prejudiced SSgt Taylor.

The Government argues that the real purpose of the dismissal was preserving the option of confinement by obtaining SECAF approval for SSgt Taylor's recall to active duty, not beating the speedy-trial clock. Ans., 22–23. But this argument is unsound because the dismissal was not necessary to seek SECAF approval of the recall. While the relevant regulation indicated that requests were generally made before preferral, it allowed for such requests to be made after preferral by requiring that a copy of the charge sheet and personal data sheet be included with a request if charges had been preferred. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 18 January 2019 (incorporating Department of the Air Force Guidance

Memorandum 2020-03, dated 24 November 2020), paras. 4.14.6., 4.14.6.2.[1] The Government could have sought to preserve the option of confinement by seeking SECAF's approval of SSgt Taylor's recall without dismissing the Charge. But doing so would have almost certainly resulted in a violation of SSgt Taylor's right to speedy trial under R.C.M. 707, which the government recognized because it knew SECAF's approval would take four to six months. App. Ex. XI, Attachment 4. Consequently, the Government dismissed the charge to avoid violating R.C.M. 707 while it sought SECAF approval, as the Staff Jude Advocate's (SJA's) legal review of the request confirms when it says:

> Recognizing SSgt Taylor's right under Rule for Courts-Martial (RCM) 707 to be arraigned within 120 days of preferral of charges, on 11 December 2020, the Special Court Martial [sic] Convening Authority dismissed the Charge and its Specifications, without prejudice. The Charge and its Specifications will be re-preferred upon approval of the request for recall to active duty by the Secretary of the Air Force.

ROT Vol. 4, Legal Review – Request to Recall to Active Duty, dated 19 January 2021, para. 4.c. The Government attempts to explain away this legal review by asserting, without further explanation, that it is a correct statement of law. Ans., 24. This argument evades the logical conclusion from the SJA's legal review. It is a correct statement of law that SSgt Taylor had a right under R.C.M. 707 to be arraigned within 120 days of preferral. The fact that the convening authority dismissed the charge because he recognized this right, as the SJA says, means he dismissed the charge to avoid violating it. This shows that the real, sole purpose of the dismissal was to avoid a speedy trial violation, making it a subterfuge.

[1] This regulation has since been superseded by Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, which includes substantially the same referenced provisions at paragraphs 3.11 and 3.11.2.

The Government also relies on part of the discussion to R.C.M. 707(c)(1) which indicates that reasons for excludable delays might include "time to process a member of the reserve component to active duty for disciplinary action."[2] *See* Ans., 19, 22–23. It argues that it would not have exceeded the speedy trial clock because the delay was excusable. *Id.* at 22. However, the 313 days that elapsed between the dismissal and repreferral were not excluded by an appropriate authority. *See* App. Ex. 10, 3–4. The convening authority did exclude 11 days, between 14 August and 24 August 2020, stating, "The reason for this delay was time required to process the accused onto active duty orders for disciplinary purposes." App. Ex. X, Attachment 11. The fact that the convening authority excluded a small amount of time for this purpose before choosing to dismiss the charge suggests that it was not guaranteed the convening authority or the military judge would have excluded the lengthy delay, as the Government assumes they would. The convening authority chose to avoid a speedy trial issue by dismissing the charge, making that dismissal subterfuge.

The Government also attempts to reframe the long delay between dismissal and repreferral as a benefit to SSgt Taylor, arguing that he had "10 months without preferred charges hanging over his head." Ans., 23. This ignores the reality that SSgt Taylor knew throughout this period that the dismissed charges were very likely to be repreferred. *See* App. Ex. X, 19 (noting SSgt Taylor's annual tour was continuously not scheduled so that it could be used for an eventual preferral or court-martial). Making matters worse, during this extended period where he faced impending legal jeopardy, he lacked a forum in which he could assert his rights, including his right to speedy trial. This is hardly the benefit the Government claims it to be.

[2] The Government's reliance on this language, which specifies processing a member of the reserve component to active duty, contradicts its later arguments that it was not necessary for SSgt Taylor to be brought to active duty, as discussed in Issue II *infra*.

In its Answer, the Government also points to *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007). Ans., 17. It asserts that *Tippit* stands for the proposition that seeking SECAF approval of a recall to preserve the possibility of confinement is a legitimate purpose for dismissal, meaning there is no subterfuge when that is the purpose. Ans., 17; *see also* App. Ex. XI, 6. The relevant quoted language, which is dicta, reads, "Even if the desire to obtain Secretarial approval was a matter considered by the SJA or the convening authority in November 2001, that would not establish that the command took such action as a subterfuge to evade the R.C.M. 707 speedy trial clock." *Tippit*, 65 M.J. at 80. The Government misreads *Tippit*. The Court of Appeals for the Armed Forces was merely explaining that, just because the defense shows that seeking secretarial approval was a consideration for a dismissal, that is not enough on its own to establish subterfuge. Here, the conclusion that the dismissal was subterfuge is based on much more than the apparent consideration of seeking SECAF approval, including a statement by the SJA that the SPCMCA dismissed the charge because he recognized the R.C.M. 707 issue. ROT Vol. 4, Legal Review – Request to Recall to Active Duty, dated 19 January 2021, para. 4.c.

Moreover, this case is easily distinguishable from *Tippit*. In *Tippit*, there was an ongoing investigation into additional misconduct when the convening authority dismissed the original charges, and the second preferral included new specifications. 65 M.J. at 72, 80. In fact, "the military judge focused solely on the ongoing investigation as the basis for the convening authority's disposition of the charges, and concluded that it was a valid basis for the dismissal." *Id.* at 80. In contrast here, there is no evidence of any ongoing investigation at the time of the dismissal, and the charge and specifications from the second preferral are identical to those from the first preferral. *See* App. Ex. X, Attachments 2, 17. The dismissal in *Tippit* also occurred when fewer than 60 days had expired in the speedy trial calculation. 65 M.J. at 80. Even accounting for

excluded time here, 108 days had expired without the charge being referred at the time of the dismissal, bringing the dismissal much closer to the 120-day requirement of R.CM. 707. The court in *Tippit* concluded:

> Most significantly, the defense has not demonstrated that the charges were dismissed on November 6, 2001, for the purpose of providing a sufficient opportunity to obtain Secretarial approval prior to expiration of the 120-day speedy trial clock. . . . [T]he defense has not shown that anyone in authority had determined that the remaining period on the clock was insufficient to obtain Secretarial approval.

Id. at 80. This case differs sharply from *Tippit* because the record demonstrates that the charge against SSgt Taylor was dismissed for the purpose of providing a sufficient opportunity to obtain Secretarial approval prior to the expiration of the 120-day speedy trial clock. Likewise, the SJA's legal review shows that the SPCMCA and the SJA determined the remaining period was insufficient to obtain Secretarial approval. ROT Vol. 4, Legal Review – Request to Recall to Active Duty, dated 19 January 2021, para. 4.c. The record in this case establishes exactly what the court in *Tippit* found to be lacking, and it therefore shows subterfuge when considering *Tippit*.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings and sentence and dismiss the Charge and its Specifications with prejudice.

II.

The general court-martial lacked personal jurisdiction over SSgt Taylor because he did not perform IDT the day after the offense, was not on active duty for the preliminary hearing under Article 32, UCMJ, and was not properly issued active-duty orders for arraignment or trial.

The Government argues it was sufficient for SSgt Taylor to be in inactive duty training status (IDT)[3] for his preliminary hearing, arraignment, and court-martial. Ans., 37. This reflects a theme repeated throughout the Government's answer that a military status—any military status—is good enough for *every* phase of the court-martial process. *E.g.*, Ans., 43 ("[T]he issue is one of being in a military status, whether active duty, inactive duty for training, or otherwise."). This is a wrong account of the law because there are proceedings for which SSgt Taylor had to be on active duty. R.C.M. 204(b)(1) states, "A member of a reserve component must be on *active duty* prior to arraignment at a general or special court-martial." (emphasis added). For the reasons detailed in his original brief, SSgt Taylor maintains this was also necessary for other proceedings, including the preliminary hearing. App. Br., 18–20. The differences between military statuses matter for courts-martial, and this Court must not treat them all as being sufficient at every stage of the process as the Government urges it to do.

The Government continues to rely on the false notion that any duty status is sufficient when arguing it was unnecessary for the Military Personnel Flight to issue SSgt Taylor orders such as an AF Form 938. Ans., 38. The Government points out that this form is titled "Request and authorization for Active Duty Training/Active Duty Tour," meaning it is not necessary for IDT status, which the Government repeatedly argues was good enough for any court-martial

[3] In a scrivener's error, SSgt Taylor's initial brief mistakenly referred to inactive duty training as "individual duty training." App. Br., 3. References to "IDT" in both the initial brief and this reply should be read as referring to inactive duty training.

proceedings. *Id.* This argument ignores not only the law, as described above, but also the plain language in the evidence. The General Court-Martial Convening Authority (GCMCA) issued a series of orders which all specifically stated SSgt Taylor was "involuntarily recalled to *active* duty" for certain dates and for the purposes of specified proceedings. App. Ex V; App. Ex. X, Attachments 16, 19; App. Ex. XXX; App. Ex. XXXV (emphasis added). However, when the government describes these documents, it omits the word "active," repeatedly stating that each one of them "ordered [SSgt Taylor] to duty." Ans., 30. This trend continues in the Government's analysis, where it notes the GCMCA ordered SSgt Taylor "to duty." Ans., 38. By repeatedly omitting the word "active," the Government subtly mischaracterizes the evidence in support of its argument that any military duty status is good enough. The Government also concludes a paragraph in which it argued the GCMCA ordered SSgt Taylor "to duty" by stating, "What matters is whether the GCMCA ordered Appellant to active duty, which he did." Ans., 38. This statement seemingly concedes that it was necessary for SSgt Taylor to be on active duty for certain proceedings. Moreover, when read together with the other arguments that any military status was sufficient for any phase of the court-martial, it creates the nonsensical argument that as long as the GCMCA *ordered* SSgt Taylor to active duty, it does not matter which status he was *actually in*. The Court must reject these arguments because placing SSgt Taylor on active-duty status was necessary both to fulfill the requirements of the rules for certain proceedings and to abide by the plain language of the GCMCA's orders.

In addition to arguing that the issuance of an AF Form 938 was unnecessary because SSgt Taylor did not need to be on active duty, the Government points to a series of cases that have held that administrative errors on an AF Form 938 do not divest a court-martial of jurisdiction. Ans., 38 (citing *United States v. Ferrando*, 77 M.J. 506 (A.F. Ct. Crim. App. 2017); *United States v.*

Lull, ACM 39555, 2020 CCA LEXIS 301 (A.F. Ct. Crim. App. 2 Sep. 2020) (unpub. op.); *United States v. O'Connor*, ACM 38420, 2015 CCA LEXIS 47, at *11 (A.F. Ct. Crim. App. 12 Feb. 2015) (unpub. op.); *United States v. Toro*, No. 2013-23, 2013 CCA LEXIS 852 (A.F. Ct. Crim. App. 2 Oct. 2013) (unpub. op.)). However, these cases have an important fact in common: the accused actually received an AF Form 938, or orders in similar form, placing them on active duty. *Ferrando*, 77 M.J. at 509; *Lull*, 2020 CCA LEXIS 301, at *19; *O'Connor*, 2015 CCA LEXIS 47, at *8; *Toro*, 2013 CCA LEXIS 852, at *6. The difference here is that SSgt Taylor never received an AF Form 938 or any other orders placing him on active duty, and the record indicates no such orders were generated. *See* App. Ex. XXVII ("It is not the practice of the FSS to generate AF Form 938.") This means the Government never carried out the GCMCA's intent to recall SSgt Taylor to active duty. Not issuing the proper orders at all is more than an administrative error; it is a failure to take the action necessary to place SSgt Taylor in the requisite status. The Government is asking this Court to take the holdings in the cited cases a considerable step further by concluding that a failure to issue the proper documents at all is an administrative error equivalent to mistakes made on an issued document. The Court must reject this contention. In *Lull*, the Court referred to "an apparent mistake on Appellant's AF Form 938 in carrying out the otherwise clear intent of senior Air Force officials to properly recall Appellant to active duty." 2020 CCA LEXIS 301, at *21. This statement implicitly indicates that it is necessary to take some action, such as issuing an AF Form 938, to carry out an Air Force official's intent that a member be recalled to active duty. Where no such action occurred, the error is more than administrative, and for the reasons argued in his initial brief, SSgt Taylor maintains that this error is of jurisdictional magnitude. App. Br., 20–21.

Finally, the Government discusses the history behind the legislative changes to Article 2(a)(3), UCMJ, 10 U.S.C. § 802(a)(3), and argues that SSgt Taylor's circumstances represent one situation which led Congress to make these changes. Ans., 33–35. When a statutory text has a plain meaning, consulting legislative history is both unnecessary and disfavored. *See, e.g., Lamie v. United States Tr.*, 540 U.S. 526, 536, (2004) ("We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."); *United States v. Wilson*, 73 M.J. 529, 531 (C.A.A.F. 2014) (reasoning that when the language of a statute is clear, that "render[s] resorting to legislative history unnecessary"). Here, the statute at issue plainly refers to "[i]ntervals between inactive duty training on consecutive days, pursuant to orders or regulations." Art. 2(a)(3)(B)(iii), UCMJ, 10 U.S.C. § 802(a)(3)(B)(iii). It makes no reference to scheduled IDTs, so the Government's argument that he was subject to military jurisdiction at the time of the charged misconduct because it was between his scheduled IDTs goes against the plain language of the statute. Ans., 36. Further, the Government points to testimony by the unit commander that the unit has the discretion to keep members "in status" when they do not show up for IDTs, and the Government goes on to argue the unit kept SSgt Taylor "in status." Ans., 35–36. It is not clear what "status" this refences, but the statutory language is far more precise. If a member did not perform IDT on consecutive days, pursuant to orders or regulations, then the plain language of the provision at issue does not convey jurisdiction. Applicable regulations specify what constitutes IDT and do not grant commanders an unlimited latitude to designate any activity as IDT. *See* App. Br., 15–18. Applying the plain language of the statute, this Court should hold that SSgt Taylor's situation does not meet the specific requirements for personal jurisdiction at the time of the offense.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the

findings and sentence and dismiss the Charge and its Specifications.

III.

The specifications of which SSgt Taylor was convicted are defective because they failed to allege a status that indicates the basis for jurisdiction.

The Government's failure to appreciate the consequences of differences between military duty statuses affects this issue as well, where it argues the specifications sufficiently identified the basis for jurisdiction over SSgt Taylor. Ans., 40–41. As the Government notes, the specifications allege SSgt Taylor's armed force, unit, and position. *Id.* at 40. However, these factors are not enough to convey jurisdiction under these circumstances because the jurisdiction is purportedly based on IDTs performed on consecutive days. The Government also misapprehends SSgt Taylor's argument, erroneously asserting it hinges upon the argument that SSgt Taylor was not subject to jurisdiction at the time of the offense. *Id.* Even assuming that SSgt Taylor was subject to military jurisdiction at that time, the specifications still needed to state the specific basis for jurisdiction. This requirement applies here because SSgt Taylor was not on active duty at the time of the offense. *See* R.C.M. 307(c)(3), Discussion (C)(iv)(a)–(b). The R.C.M. discussion describing this requirement specifies that it is not necessary for members on active duty. *Id.* This Court implicitly recognized this in *Lull* when it found this discussion language did not apply "because Appellant had been recalled to active duty service." 2020 CCA LEXIS 301, at *15–16. In contrast, SSgt Taylor had not been recalled to active duty service at the time of the offense, so the language which did not apply in *Lull* does apply here because of the difference in military status. *Id.* Because SSgt Taylor was not on active duty, the specifications need to indicate the basis for jurisdiction. They are defective because they failed to do so.

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings of guilty and the sentence and dismiss the Charge and its Specifications.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 February 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES,

Appellee,

v.

Staff Sergeant (E-5)
JAMES L. TAYLOR, JR.
United States Air Force,

Appellant.

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APPELLANT'S MOTION FOR ORAL ARGUMENT

Before Special Panel

No. ACM 40371

5 February 2024

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

Pursuant to Rules 23 and 25 of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) James L. Taylor, Jr., hereby moves for oral argument on the following issues:

I.

WHETHER THE GOVERNMENT VIOLATED SSGT TAYLOR'S RIGHTS TO SPEEDY TRIAL UNDER BOTH RULE FOR COURTS-MARTIAL 707 AND THE SIXTH AMENDMENT WHEN THE CHARGE AND SPECIFICATIONS WERE DISMISSED AND LATER REPREFERRED AS A SUBTERFUGE TO AVOID A SPEEDY-TRIAL VIOLATION.

II.

WHETHER THE GENERAL COURT-MARTIAL HAD JURISDICITON OVER SSGT TAYLOR WHEN HE DID NOT PERFORM INACTIVE DUTY TRIANING THE DAY AFTER THE CHARGED INCIDENT, HE WAS NOT ON ACTIVE DUTY FOR THE PRELIMINARY HEARING, AND THE ORDERS TO RECALL HIM TO ACTIVE DUTY WERE NEVER PROPERLY EXECUTED.

WHEREFORE, SSgt Taylor respectfully requests this Honorable Court grant the motion for oral argument.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 February 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.**, USAF, *Appellant.*	)))))))))	**UNITED STATES' NON-OPPOSITION TO ORAL ARGUMENT** No. ACM 40371 Panel No. 2 9 February 2024

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

On 5 February 2024, Appellant submitted a Motion for Oral Argument on Issues I and II in his Assignment of Errors. The Government does not oppose the Motion.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 February 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James L. TAYLOR, JR.	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 5 February 2024, Appellant filed a Motion for Oral Argument. In that motion, Appellant requested oral argument on two of the five assignments of error he submitted on 28 December 2023. On 9 February 2024, Appellee filed a response, stating it does not oppose Appellant's motion.

Appellant's motion is hereby granted on the following issue only, which as framed by Appellant is:

> **WHETHER THE GENERAL COURT-MARTIAL HAD JURISDICTION OVER APPELLANT WHEN APPELLANT DID NOT PERFORM INACTIVE DUTY TRAINING THE DAY AFTER THE CHARGED INCIDENT, APPELLANT WAS NOT ON ACTIVE DUTY FOR THE PRELIMINARY HEARING, AND THE ORDERS TO RECALL APPELLANT TO ACTIVE DUTY NEVER WERE PROPERLY EXECUTED.**

Accordingly it is by the court on this 15th day of February, 2024,

ORDERED:

Appellant's Motion for Oral Argument is **GRANTED IN PART** as specified above. The remainder of Appellant's motion is **DENIED**.

Oral argument on this issue will be heard at **1000 hours on Thursday, the 21st of March, 2024**, in the courtroom of the United States Air Force

Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE OF**
Appellee	)	**GOVERNMENT COUNSEL**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40371
JAMES L. TAYLOR,	)	
United States Air Force	)	18 March 2024
Appellant	)	

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

The undersigned hereby enters appearance as counsel for the United States in the above-captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will appear as co-counsel on behalf of the United States.

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

United States Air Force Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40371**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James L. TAYLOR, JR.	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

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

> Whether the general court-martial convening authority had authority under Article 2(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(d), to order Appellant to active duty for trial with respect to offenses alleged to have been committed during an interval between inactive-duty training on consecutive days when the text of Article 2(d)(2), UCMJ, limits that authority to offenses committed by a member of a reserve component while the member was on active duty or on inactive-duty training.

Accordingly, it is by the court on this 25th day of March, 2024,

ORDERED:

Appellant and Appellee shall file briefs on the specified issue with this court. Briefs are due **not later than 15 April 2024**. Reply briefs will not be permitted without leave from the court.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.**, USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION TO CITE SUPPLEMENTAL AUTHORITY** No. ACM 40371 Panel No. 2 22 March 2024

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

Pursuant to Rules 23.3(d) and 25.2(e) of this Court's Rules of Practice and Procedure, the United States respectfully moves to cite a supplemental authority.

During the oral argument in the above-captioned matter held yesterday, 21 March 2024, in response to questions from the Court regarding the propriety of the base Force Support Squadron in not issuing Air Force Forms 938 in association with each of the orders of the General Court-Martial Convening Authority recalling Appellant to active duty, the undersigned cited Air Force Instruction (AFI) 65-109, Preparation of AF Form 938 (1 September 1996, certified current on 23 September 2010), paragraph 1.2:

> **Purpose of AF Form 938**…. Do not use AF Form 938 . . . to involuntarily recall a member to active duty for the purpose of disciplinary action….

That AFI, attached hereto, supports the statement by the Davis-Monthan Air Force Base Force Support Squadron memorandum in Appellate Exhibit XXVII, which states, "It is not the practice of FSS to generate AF Form 938." In fact, it is against Air Force regulations to do so.

WHEREFORE, the United States respectfully requests that this Court grant this motion to cite supplemental regulatory authority to assist this Court in its determination of Issue II of Appellant's assignments of error.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 March 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.**, USAF, *Appellant.*	))))))))	UNITED STATES' BRIEF REGARDING SPECIFIED ISSUE No. ACM 40371 Panel No. 2 15 April 2024

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

SPECIFIED ISSUE

> **WHETHER THE GENERAL COURT-MARTIAL CONVENING AUTHORITY HAD AUTHORITY UNDER ARTICLE 2(D), UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 802(D), TO ORDER APPELLANT TO ACTIVE DUTY FOR TRIAL WITH RESPECT TO OFFENSES ALLEGED TO HAVE BEEN COMMITTED DURING AN INTERVAL BETWEEN INACTIVE-DUTY TRAINING ON CONSECUTIVE DAYS WHEN THE TEXT OF ARTICLE 2(d)(2), UCMJ, LIMITS THAT AUTHORITY TO OFFENSES COMMITTED BY A MEMBER OF A RESERVE COMPONENT WHILE THE MEMBER WAS ON ACTIVE DUTY OR ON INACTIVE-DUTY TRAINING.**

On 25 March 2024, this Court directed the parties to provide supplemental briefing on this specified issue no later than 15 April 2024.

Law

As relevant to the specified issue, Article 2(a)(3) states:

The following persons are subject to this chapter []:

(3)

(A) While on inactive-duty training and during any of the periods specific in subparagraph (B) –

(i) members of a reserve component . . .

(B) The periods referred to in subparagraph (A) are the following:

> (i) Travel to and from the inactive duty training site of the member, pursuant to orders or regulations.
>
> (ii) Intervals between consecutive periods of inactive duty training on the same day, pursuant to orders or regulations.
>
> (iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.

Article 2(d)(1) discusses the involuntary recall of reserve members for trial by court-martial. Article 2(d)(2)(B) states, "A member of a reserve component . . . may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was – on inactive-duty training."

Appellant's New Argument

During rebuttal oral argument on 21 March 2024, Appellant's counsel argued he could not be lawfully recalled to active duty for prosecution of the crime he committed the evening between inactive duty for training (IDT) on consecutive days. He cited Article 2(d)(2)(B), which states, "A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was . . . on inactive-duty training…." Appellant argued that statute was not modified to include the new language expanding jurisdictional reach in Article 2(a)(3)(B)(iii) ("Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations."). He emphasized that Article 2(a)(3)(A) incorporates Article 2(a)(3)(B) and distinguishes the new intervals of jurisdiction from "while on inactive duty" when it states, "The following persons are subject to [the UCMJ]: (3) While on inactive-duty training and during any of the periods specified in subparagraph (B): (i) members of a reserve component."

Summary of United States' Argument

First, Appellant's first mention of Article 2(d)(2), UCMJ, throughout the entirety of the court-martial and appellate process was during rebuttal oral argument and, as it is a non-jurisdictional issue, he waived, or at least forfeited, such a challenge.

Second, Congress added periods adjacent to inactive-duty training (IDT) within Article 2's term "while on inactive-duty training." Alternatively, if Article 2(d)(2) precluded prosecution despite Congress's recent expansion of jurisdiction under Article 2(a)(3)(B), it would lead to the absurd result that his conviction and sentence, as well as that of every other reservist prosecuted under Article 2(a)(3)(B), would be invalid.

ARGUMENT

Law and Analysis

1. Appellant Forfeited Any Challenge Based on Article 2(d)(2), UCMJ

a. Appellant Failed to Raise Timely his Article 2(d)(2) Argument

Appellant did not raise the issue of Article 2(d)(2), UCMJ, at his Article 32 preliminary hearing, in his pre-arraignment Motion to Dismiss filed on 28 February 2022, at his arraignment on 22 March 2022, or at the re-arraignment at the start of his trial on 27 June 2022. He did not raise the issue in his Assignment of Error filed with this Court on 28 December 2023 or in his Reply brief filed on 5 February 2024. In fact, Appellant's counsel did not raise the issue at oral argument until the concluding moments of his rebuttal argument on 21 March 2024, two full years after his arraignment.

b. Article 2(d) is Not a Jurisdictional Subsection of the Statute and is, Thus, Waivable and Forfeitable

Article 2(d) is not a jurisdictional subsection of the statute; rather, it governs the procedural exercise of a court-martial's authority. Articles 2(a), 2(b), and 2(c) explicitly refer to notions of

jurisdiction. Article 2(a) states, "The following persons are subject to [the UCMJ]…." Article 2(b) states, "The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a)…." Article 2(c) states, "Notwithstanding any other provision of law, a person serving with an armed force who [meets four criteria] is subject to [the UCMJ]...."

Nowhere in Article 2(d) or its five subsections is there a reference to jurisdiction or being "subject to the UCMJ." That is because a military member does not need to be involuntarily recalled to active duty to be prosecuted at court-martial. *See, e.g.,* United States v. Ernest, 32 M.J. 135, 140, n.4 (C.M.A. 1991) (finding that, because the appellant was subject to the UCMJ under Article 2(c), there was no need to address the appellant's argument that he was not properly involuntarily recalled under Article 2(d)). A military member can be prosecuted if he or she appears at the court-martial, regardless of his or her status, if that status has not been "completely terminated." R.C.M. 202(a)(5), 202(c), and 204(d).

Article 2(d)(1) empowered convening authorities to use their discretion to involuntarily recall a military member to active duty, but it does not require them to do so. Of course, as a practical matter, an individual accused of a crime might not appear voluntarily for a court-martial, which could result in a waste of time and resources if court members, a military judge, witnesses, and others are present for a court-martial, but the accused is not present and cannot be tried in absentia. The only way to ensure the member's presence at trial is to involuntarily recall him or her to active duty.

As the Court of Appeals for the Armed Forces has explained, "For reservists, military status is defined by and dependent upon Articles 2(a) and 2(c), UCMJ, which prescribe two alternative bases for court-martial jurisdiction." United States v. Morita, 74 M.J. 116, 120 (C.A.A.F. 2015).

Importantly, as this Court has stated, "**Article 2(d) does not confer jurisdiction; it just describes how and under what circumstances a reservist can be ordered to active duty for purposes of a court-martial.**" Morgan v. Mahoney, Misc. Dkt. No. 99-03, 1999 CCA LEXIS 173, *7 (A.F. Ct. Crim. App. 15 March 1999) (unpub. op.) (emphasis added).

In United States v. Marquez, 2017 CCA LEXIS 177 (Army Ct. Crim. App. 22 March 2017) (unpub. op.), *rev. denied*, 76 M.J. 430 (C.A.A.F. 2017), the appellant challenged, on appeal but not prior to arraignment, the validity of his recall to active duty under Article 2(d), which authorized by the Assistant Secretary of the Army for Manpower and Reserve Affairs instead of by the Secretary of the Army, and thus his term of confinement. Id. at *2. The Army Court confirmed Article 2(d) was not a jurisdictional matter, and thus the appellant had waived it with his guilty plea:

> Appellant does not attack the court-martial's jurisdiction, which we certainly understand after considering the components thereof and finding them present here. *See* United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006) ("Generally, there are three prerequisites that must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial."); United States v. Nealy, 71 M.J. 73, 75 (C.A.A.F. 2012); and United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012) (citing Rule for Courts-Martial 201(b)).

Id. at *3.

Because Article 2(d)(2) is not a jurisdictional subsection of the statute, it is forfeitable under R.C.M. 905(e).

c. Appellant Forfeited the Article 2(d)(2) Argument under R.C.M. 905(e)

R.C.M. 905(e) states:

> (1) Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections

> absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.
>
> (2) Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent an affirmative waiver.

The Courts have affirmed forfeiture under R.C.M. 905(e) under various circumstances, including but not limited to later-raised allegations of defective preferral and unlawful command influence, United States v. Givens, 82 M.J. 211 (C.A.A.F. 2022); improper taint to an Article 32 preliminary hearing, United States v. O'Connor, No. ACM 38420, 2015 CCA LEXIS 47 (A.F. Ct. Crim. App. 12 Feb. 2015) (unpub. op.); failing to provide the convening authority with written pretrial advice, United States v. Murray, 25 M.J. 445 (C.M.A. 1988); and unreasonable multiplication of charges, United States v. Hardy, 77 M.J. 438 (C.A.A.F. 2018). In United States v. Barraza, 5 M.J. 230, 235 (C.M.A. 1978), the Court found the appellant had waived his constitutional challenge to involuntary activation orders for duty during which he was prosecuted by court-martial. CMA found waiver based on "the complete absence of any evidence or protest, either formal or informal, against these orders by the appellate to any military authorities." Id.

Appellant failed to challenge under Article 2(d)(2) the orders recalling him to active duty either before or during his court-martial. In fact, Appellant did not mount such a challenge until his oral argument rebuttal, years later on appeal. Appellant appeared at his court-martial, which already had jurisdiction over him pursuant to Article 2(a)(3). (Govt. Br., dtd. 29 January 2024). Since the purpose of Article 2(d) is to ensure a member shows up to his court-martial (not to confer jurisdiction), the fact that Appellant showed up to his court-martial without objecting under Article 2(d)(2) waived any error in the implementation of Article 2(d). *Cf.* Barraza, 5 M.J. at 235.

Appellant does not allege his trial defense counsel provided ineffective assistance of counsel by not raising the Article 2(d)(2) issue, and their failure to do so was not plain error. Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error materially prejudiced a substantial right. United States v. King, 83 M.J. 115, 123 (C.A.A.F. 2023) (citation omitted). The burden of proof under a plain error review is on the appellant. *See* United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006) (citation omitted).

As discussed in Sections 2 and 3, *infra*, Appellant's Article 2(d)(2) argument is without merit. However, even if there was arguable error in Appellant's case, it was not clear or obvious. Article 2(a)(3)(B) is a new amendment to the statute and the undersigned has found no case law on point that could have put trial defense counsel on constructive notice that they should have asserted a challenge under Article 2(d)(2). The general court-martial convening authority's orders recalling Appellant to active duty for court-martial proceedings had been approved in advance by SECAF, and the court-martial was properly convened, composed, and referred. Finally, there was no prejudice to a substantial right. Appellant received a fair trial, with no misconduct or error by the military judge or prosecution, and he cannot avail himself of the circular argument that he was prejudiced merely because his trial took place.

Appellant failed to raise his non-jurisdictional Article 2(d)(2) argument prior to arraignment, and it was not plain error, so he waived, or at least forfeited, the issue.

2. Congress Expanded Jurisdiction over Reservists in Article 2(a)(3)(B), and Included IDT-Adjacent Intervals within the Rubric of "On Inactive-Duty Training"; Alternatively, Appellant's Argument under Article 2(d)(2) Would Have the Impermissibly Absurd Result of Negating All Such Jurisdictional Expansion

Although Appellant waived or forfeited the Article 2(d)(2) argument, this Court should additionally decide that Appellant's argument must fail because Congress included IDT-adjacent intervals within the rubric of "on Inactive-Duty Training" and, alternatively, it would lead to an

absurd result in his case and in every case in which reservists are recalled for trial by court-martial pursuant to the jurisdiction Congress created in Article 2(a)(3)(B)(i), (ii), and (iii).

a. Congress Enacted the 2017 NDAA Amendments to Expand Jurisdiction over Reservists

As discussed in the Government's Answer to Appellant's Assignment of Error, the 2015 report of the Military Justice Review Group (MJRG), led by Senior Judge Effron and heralded by Judge Ohlson, recommended legislative changes to Article 2(a)(3) to ensure UCMJ jurisdiction applies to misconduct committed throughout IDT drill weekends, including outside of working hours, providing commanders with better options to address misconduct incident to periods of IDT.

In the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894-95 (2016), Congress enacted verbatim the language proposed by the MJRG, expanding jurisdiction over reservists to include periods of travel to and from the inactive-duty training site of the member, pursuant to orders or regulations; intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations; and intervals between inactive-duty training on consecutive days, pursuant to orders or regulations. Article 2(a)(3)(B), UCMJ.

b. Article 2(a)(3)(B) Includes IDT-Adjacent Periods within "on Inactive-Duty Training" and Any Ambiguity Congress Created Would Require the Court's Statutory Interpretation to Preserve the Statute's Validity

i. Titles-and-Headings and Whole-Text Canons of Statutory Interpretation

Appellant argues that, because Article 2(d)(2) prohibits ordering reservists to active duty under 2(d)(1) except with respect to an offense committed while the member was on active duty or "on inactive-duty training," and Congress failed to amend 2(d)(2)(B) to include the IDT-adjacent periods listed in Article 2(a)(3)(B), the general court-martial convening authority could

not have validly ordered Appellant to duty based on his sexual assault taking place during the interval between inactive-duty training on consecutive days. Appellant seizes on the phrase "on inactive-duty training" in one sub-subsection of the statute, Article 2(d)(2)(B), and argues it does not include the intervals adjacent to inactive-duty training from Article 2(a)(3)(B). However, he fails to acknowledge Article 2(a)(3)(B) is included in the category of "on inactive-duty training," as explained just below. And even if there is any ambiguity between Article 2(a)(3)(B) and Article 2(d)(2)(B), a review of Article 2 as a cohesive whole must include crimes committed during IDT-adjacent periods from Article 2(a)(3)(B) in Article 2(d)(2)(B).

Although Congress did not repeat the new jurisdictional language from Article 2(a)(3)(B) in Article 2(d)(2)(B), it did not need to do so. According to the "Titles-and-Headings" Cannon of Statutory Interpretation, the titles and headings of a statute are permissible indicators of meaning to resolve doubt about the meaning of a statute. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012); Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998). In the 2017 NDAA, Article 2(a)(3)(B) falls under the heading , "SEC. 5102. CLARIFICATION OF PERSONS SUBJECT TO THE UCMJ **WHILE ON INACTIVE-DUTY TRAINING**." Pub. L. 114-328, 130 Stat. 2894 (emphasis added). Therefore, under the "Title-and-Headings" Cannon of Statutory Interpretation, bolstered by the history leading to the 2017 NDAA's amendment, Article 2(a)(3)(B)'s expansion to include IDT-adjacent periods pulls those additional periods within the term "while on inactive-duty training." In this case, the heading in the NDAA makes clear that, during "intervals between inactive-duty training on consecutive days," servicemembers are also considered to be "on inactive duty training."

Moreover, applying the "Whole-Text Canon" of statutory interpretation, "the Court must look to the particular statutory language at issue, as well as the language and design of the statute

as a whole." Scalia & Garner, *Reading Law* 167 (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). Thus, Article 2(d)(2)'s "while on inactive-duty training" must be viewed in relation to amended Article 2(a)(3)(B)'s expansion under "Clarification Of Persons Subject To The UCMJ While On Inactive-Duty Training." As a result, the interval between two consecutive days of IDTs pursuant to regulations, when Appellant committed his crime, is included in the term "while on inactive-duty training" for purposes of Article 2 jurisdiction.

ii. "Presumption of Validity" Canon of Statutory Interpretation

Bolstering the Title-and-Headings Canon, the "Presumption of Validity Canon" weighs against Appellant's argument that Article 2(d)(2) invalidates Article 2(a)(3)(B). Under the Presumption of Validity Canon, an interpretation of a statute that renders it valid is preferable to an interpretation that would invalidate it. United States v. Kohlbek, 78 M.J. 326 (C.A.A.F. 2019) (citing Scalia & Brian, *Reading Law); see also* Scalia & Brian, *Reading Law* 66 ("[t]he presumption might be viewed as a species of the presumption against ineffectiveness, since an interpretation that renders a provision invalid (unlawful) 'obstructs' its application to the maximum"). "When a statute is a part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act *in pari materia* with the statute under review." United States v. Michael McPherson, 73 M.J. 393, 395-96 (C.A.A.F. 2014) (internal citations omitted)). The Court of Appeals for the Armed Forces cautions that it "has no license . . . to construe statutes in a way that 'undercut[s] the clearly expressed intent of Congress.'" *Id*. at 396 (internal citations omitted).

According to Appellant's argument, the unchanged Article 2(d)(2) would invalidate the new jurisdictional reach of Article 2(a)(3)(B). Thus, the presumption of validity (and against ineffectiveness) weighs in favor of the Court determining that Article 2(d)(2) includes the three

additional IDT-adjacent periods of Article 2(a)(3)(B) in the term "while on inactive-duty training." Much like the old story about zoning legislation stating, "No drinking saloon may exist within a mile of any schoolhouse," Appellant apparently would have the school moved instead of the saloon. *See* Scalia & Garner, *Reading Law* 63.

iii. The Plain Reading of the Whole Text of Article 2 Demonstrates the IDT-Adjacent Periods in Article 2(a)(3)(B) are Included in the Term "on Inactive-Duty Training"

Appellant's "plain language" argument ignores the requirement to read the statute as a "cohesive whole" and, instead, tries to apply the plain language rule to a fragment of the statute to reach an absurd result. "In the absence of a statutory definition, the plain language of a statute will control unless it is ambiguous or leads to an absurd result." United States v. Cabuhat, 83 M.J. 755, 765 (A.F. Ct. Crim. App. 2023) (citing United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)). The Court of Appeals for the Armed Forces allows that "a court can refuse to apply the literal text of a statute," but only "in very limited circumstances." United States v. Danny McPherson, 81 M.J. 372, 380 (C.A.A.F. 2014). Article 2 does not define "inactive-duty for training," which is not a term subject to a plain and ordinary meaning. Accordingly, this term is only defined by reference to other statutes and other parts of this statute, including the circumstances described in Article 2(a)(3)(B)(i)-(iii).[1] Therefore, Appellant's "plain language" argument is misdirected, because a

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[1] "Inactive-duty training" is defined in 38 U.S.C. § 101(23). The following are the portions of the statutory definition that apply to Appellant, and they do not provide a description of IDTs that would support his position of what "while on inactive-duty status" means:

> (A) duty (other than full-time duty) prescribed for Reserves . . . by the Secretary concerned under section 206 of title 37 or any other provision of law;
>
> (B) special additional duties authorized for Reserves . . . by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned….

plain reading of Article 2 as a cohesive whole demonstrates he committed his crime "while on inactive-duty training."

c. If Appellant's Argument Prevails, it Would Have the Impermissibly Absurd Result of Negating Congress's Expansion of Jurisdiction over Appellant and All Reservists Recalled to Active Duty for Court-Martial.

Even if this Court were to conclude Congress erred in failing to modify Article 2(d)(2) to repeat the IDT-adjacent periods of time from the new Article 2(a)(3)(B), when a legislature makes a substantive error concerning the actual effect of a new law, "a departure from the letter of the law may be justified to avoid an absurd result if the absurdity . . . is so gross as to shock the general moral or common sense." Id. (internal citation omitted); see also Scalia & Brian, *Reading Law* 234. For example, in United States v. Tabor, 82 M.J. 637 (N-M Corps Ct. Crim. App. 2022) (*en banc*), *rev. denied*, 83 M.J. 64 (C.A.A.F. 2022), the Navy-Marine Corps Court sitting *en banc* cited the absurdity doctrine in concluding, " It simply cannot be the case that Congress intended for Article 120b(c), UCMJ, to only criminalize indecent acts performed in the presence of children who were alert, while carving out an exception for an accused who preyed upon vulnerable, unalert, victims." Id. at 656 (internal citations omitted) (cited in United States v. Cabuhat, 83 M.J. 755 (A.F. Ct. Crim. App. 2023).

According to Appellant's reading of Article 2, Congress expanded jurisdiction over reservists – by including travel before and after IDT periods, as well as time between consecutive IDT periods on the same day or between IDT periods on consecutive days -- by changing the language in Article 2(a)(3)(B), but then precluded the ability to use that very same expanded jurisdiction by failing to include the same expansions in the language of Article 2(d)(2)(B) for

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Furthermore, following the cross-reference to 37 U.S.C. § 206, *Reserves; members of National Guard: inactive-duty training*, provides no description of IDTs that would support Appellant's position.

recalling them to active duty. As a result, not only would Appellant's prosecution, conviction, and sentence be overturned, but all past, present, and future prosecutions of reservists involuntarily recalled to active duty for court-martial under Article 2(a)(3)(B) would be overturned and barred. That result is clearly not what Congress intended, or what any reasonable legislature could have intended. Our superior Court recently stated, "courts should not reject the plain meaning of a statute if a rational Congress *could have* intended that meaning." McPherson, 81 M.J. at 380 (emphasis in original) (internal citations omitted). But here, a rational Congress could not have amended Article 2(a)(3)(B) but then intended that it could never be implemented based on Article 2(d)(2). Congress does not pass laws intending them to have zero application or impact. This weighs in favor of rejecting the "plain language" interpretation of Article 2 that Appellant now advances.

In Article 2(a)(3)(B)(iii), Congress clearly intended to follow the MJRG's recommendation to make reservists subject to the UCMJ during intervals between consecutive days of IDT periods. In recommending expanded jurisdiction over reservists, the MJRG noted, "Misconduct that occurs during the periods described [in Article 2(a)(3)(B)], which, for example, could include driving under the influence, damage to government quarters, or a crime of violence, has the potential to negatively affect good order and discipline in the armed forces." REPORT OF THE MILITARY JUSTICE REVIEW GROUP 154 (22 Dec. 2015). https://ogc.osd.mil/Portals/99/report_part1.pdf.

In Appellant's case, he committed the worst type of crime listed, one of sexual violence. Moreover, his crime had the greatest potential to negatively impact good order and discipline, because he committed his sexual assault against another member of his reserve unit. Further still, Appellant caused numerous other members from his unit to know about and be involved in

addressing his crime's aftermath, including comforting his victim and keeping a safety watch over him. If any interpretation of a statute would shock general moral and common sense, it would be interpreting Article 2(d)(2) to prohibit recalling Appellant to court-martial him for sexual assault of a fellow reservist in the middle of a drill weekend. Thus, even if the Court does not interpret Article 2(a)(3)(B)'s scenarios to be included in Article 2(d)(2)'s "while on inactive-duty training," Appellant's argument would have an inherently absurd result that the Court should not permit. In sum, the Absurdity Canon would call for Article 2(d)(2)(B) to include, after "inactive-duty training," "including periods in paragraph (a)(3)(B) of this section 802 (Article 2)".

CONCLUSION

For the foregoing reasons, the general court-martial convening authority had authority to order Appellant involuntarily to active duty for trial with respect to the sexual assault he committed during an interval between inactive-duty training on consecutive days, and this Court should affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 15 April 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JAMES L. TAYLOR, JR.,** United States Air Force, *Appellant*.	**SPECIFIED ISSUE BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40371 15 April 2024

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

Specified Issue

WHETHER THE GENERAL COURT-MARTIAL CONVENING AUTHORITY HAD AUTHORITY UNDER ARTICLE 2(D), UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 802(D), TO ORDER APPELLANT TO ACTIVE DUTY FOR TRIAL WITH RESPECT TO OFFENSES ALLEGED TO HAVE BEEN COMMITTED DURING AN INTERVAL BETWEEN INACTIVE-DUTY TRAINING ON CONSECUTIVE DAYS WHEN THE TEXT OF ARTICLE 2(D)(2), UCMJ, LIMITS THAT AUTHORITY TO OFFENSES COMMITTED BY A MEMBER OF A RESERVE COMPONENT WHILE THE MEMBER WAS ON ACTIVE DUTY OR ON INACTIVE-DUTY TRAINING.

Statement of the Case

On 22 March and 27–29 June 2022 at Davis Monthan Air Force Base, Arizona, a military judge sitting as a general court-martial convicted Staff Sergeant (SSgt) James L. Taylor, Jr., contrary to his pleas, of one charge and one specification of sexual assault and one specification of abusive sexual contact, in violation of Article 120, UCMJ,[1] 10 U.S.C. § 920. These convictions were by exceptions. The words "knew or" were excepted from each specification, and SSgt Taylor

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

was found not guilty of the excepted words for each specification. R. at 366. As a result of the exceptions, SSgt Taylor was convicted of committing the charged offenses when he reasonably should have known that A.G. was asleep. *Id.* The court also acquitted SSgt Taylor of one specification of abusive sexual contact in violation of Article 120, UCMJ. R. at 366. The military judge sentenced SSgt Taylor to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 19 months,[2] and to be dishonorably discharged from the service. R. at 396. The convening authority took no action on the findings but disapproved the adjudged reprimand. ROT Vol. 1, Convening Authority Decision on Action, 15 July 2022. The convening authority further denied SSgt Taylor's requested deferment of reduction in grade but approved SSgt Taylor's requested deferment of automatic forfeitures and waived all automatic forfeitures for a period of 6 months for the benefit of SSgt Taylor's dependent child. *Id.*

SSgt Taylor filed an initial brief with this Court on 28 December 2023. Br. on Behalf of Appellant, 28 December 2023. The Government subsequently filed an answer, and SSgt Taylor replied to that answer. United States' Answer to Assignments of Error, 29 January 2024; Reply Br. on Behalf of Appellant, 5 February 2024. SSgt Taylor also requested oral argument, and this Court granted oral argument on one issue from his assignments of error. Order, Appellant's Motion for Oral Argument, 15 February 2024. Oral argument took place on 21 March 2024. *Id.* After oral argument, the Court specified the issue addressed in this brief for additional briefing. Order, Specified Issue, 25 March 2024.

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[2] Appellant was sentenced to be confined for 19 months for Specification 1 of the Charge and 6 months for Specification 3 of the Charge, with the sentences running concurrently. R. at 396.

Statement of Facts

SSgt Taylor incorporates the statement of facts included with his initial assignments of error. Br. on Behalf of Appellant at 3–4. Additionally, SSgt Taylor offers the following additional facts, which are relevant to the specified issue.

SSgt Taylor is a reservist who was scheduled for inactive-duty training (IDT) on the weekend of 7–8 December 2019. *See* R. at 150. He completed two periods of IDT on 7 December 2019, the latter of which ended at 1530 hours, and he was scheduled for two more IDT periods on 8 December 2019, the first of which would have begun at 0630 hours. *See* App. Ex. X at Attachment 29. The charged offenses allegedly occurred in the early morning hours of 8 December 2019, with the named victim, A.G., testifying it was at approximately 0400 hours. R. at 135, 152, 273–74.

Before trial, the General Court-Martial Convening Authority (GCMCA) sought approval from the Secretary of the Air Force (SECAF) to recall SSgt Taylor to active duty. App. Ex. VI. In a memorandum dated 3 June 2021, the acting SECAF approved any recall the GCMCA may order "to preserve the possibility of confinement or restriction on liberty as a punishment option," pursuant to Article 2(d)(5), UCMJ, 10 U.S.C. § 802(d)(5). *Id.* After receiving this approval, the GCMCA signed a series of memoranda stating SSgt Taylor was involuntarily recalled to active duty for various periods corresponding with scheduled UCMJ proceedings, including arraignment and trial. App. Ex. V; App. Ex. X at Attachments 16, 19; App. Ex. XXX; App. Ex. XXXV. Each of these memoranda cited "Title 10, 802(d)" as authority. *Id.* These memoranda formed the basis for the military judge to conclude SSgt Taylor was properly recalled to active duty and subject to court-martial jurisdiction for arraignment and trial, leading him to deny SSgt Taylor's motion to dismiss for lack of jurisdiction. App. Ex. XXIX at 3–4.

Argument

THE GENERAL COURT-MARTIAL CONVENING AUTHORITY DID NOT HAVE AUTHORITY TO ORDER STAFF SERGEANT TAYLOR TO ACTIVE DUTY FOR TRIAL WITH RESPECT TO OFFENSES ALLEGED TO HAVE BEEN COMMITTED DURING AN INTERVAL BETWEEN PERIODS OF INACTIVE-DUTY TRAINING ON CONSECUTIVE DAYS BECAUSE THE PLAIN LANGUAGE OF ARTICLE 2(D), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 802(D), LIMITS THE AUTHORITY TO RECALL A MEMBER OF A RESERVE COMPONENT TO PROCEEDINGS WITH RESPECT TO AN OFFENSE COMMITTED WHILE THE MEMBER WAS ON ACTIVE DUTY OR ON INACTIVE-DUTY TRAINING.

Standard of Review

This Court reviews questions of statutory interpretation de novo. *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016). Further, "[j]urisdiction is a legal question which [this Court] review[s] de novo." *United States v. Ferrando*, 77 M.J. 506, 510 (A.F. Ct. Crim. App. 2017) (quoting *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)).

Law and Analysis

1. Under the plain meaning of the controlling statute, SSgt Taylor may not be ordered to active duty for UCMJ proceedings with respect to the charged offenses because those offenses did not occur while he was on active duty or inactive-duty training.

When interpreting a statute, the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. Morita*, 74 M.J. 116, 120 (C.A.A.F. 2015) (quoting *Robinson v. Shell Oil Company*, 519 U.S. 337, 340 (1997)). The "inquiry must cease if the statutory language is unambiguous." *Id.* The statute at issue here starts by stating in Article 2(d)(1), UCMJ, that a member of a reserve component who is subject to certain proceedings under the UCMJ may be involuntarily ordered to active duty for the purpose of a preliminary hearing under Article 32 and trial by court-martial. 10

U.S.C. § 802(d)(1). However, Article 2(d)(2) limits the circumstances under which involuntary orders to active duty are permitted:

> A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—
> (A) on active duty; or
> (B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

10 U.S.C. § 802(d)(2) (2018).[3] The meaning of this section is plain and unambiguous: a reservist may not be recalled to active duty for UCMJ proceedings, including trial by court-martial, unless one of the two specified exceptions applies.[4]

The scope of the two exceptions is likewise plain and unambiguous, and this Court has previously noted that, under the text of Article 2(d)(2), "[t]he offenses subjecting members of the reserve component to court-martial jurisdiction were limited to those that were committed while the accused was on active duty or inactive duty training." *Morgan v. Mahoney*, Misc. Dkt. No. 99-03, 1999 CCA LEXIS 173, at *6 (A.F. Ct. Crim. App. Mar. 15, 1999). "Active duty is an all-or-nothing condition." *Morita*, 74 M.J. at 120 (quoting *Duncan v. Usher*, 23 M.J. 29, 34 (C.M.A. 1986)). Here, there is no allegation or evidence that SSgt Taylor committed the charged offenses while on active duty. The second exception, which is for "an offense committed while the member was . . . on inactive-duty training," refers to specific, narrow periods of time. 10 U.S.C.

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[3] A 2023 amendment to Article 2(d)(2), UCMJ, added the words "or the Space Force" after "[a] member of a reserve component." National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 1722(f)(1)(B), 137 Stat. 136, 671 (2023). While not in effect at the time of SSgt Taylor's trial, this amendment would not have changed the meaning of Article 2(d)(2), UCMJ, with regard to his case.

[4] The clause in Article 2(d)(2)(B) referring to "members of the Army National Guard of the United States or the Air National Guard of the United States" simply imposes an additional limitation on ordering national guardsmen to active duty and does not apply to SSgt Taylor. *See* 10 U.S.C. § 802(d)(2)(B).

§ 802(d)(2)(B). Inactive-duty training "is not a tour but a block of time." *United States v. Hale*, 77 M.J. 598, 604 (A.F. Ct. Crim. App. 2018), *aff'd*, 78 M.J. 268 (C.A.A.F. 2019). Inactive-duty training specifically refers to "a designated 'four-hour period of training, duty or instruction.'" *Id.* (quoting Air Force Instruction (AFI) 36-2254V1, Reserve Personnel Participation, ¶ 4.1.1 (26 May 2010)). Based on this clear definition, this Court held in *Hale* that "no authority existed to extend a reserve member's military status 'while on inactive duty training' beyond the designated block of time." *Id.*

Applying the same reasoning here, there is no allegation that SSgt Taylor committed any offenses while on IDT. The conduct at issue occurred in the early morning hours of 8 December 2019, at approximately 0400 hours by A.G.'s account. R. at 135, 152, 273–74. This time was in the interval between periods when SSgt Taylor was on IDT the previous day, ending at 1530 hours, and was scheduled for IDT the following day, starting at 0630 hours. R. at 150, 152–53; App. Ex. X at Attachment 29. Thus, the charged misconduct was allegedly committed outside the designated blocks of time for IDT, meaning SSgt Taylor was not on IDT at the time of the alleged offenses. Under the plain and unambiguous meaning of Article 2(d)(2), neither of the exceptions apply, so SSgt Taylor "may not be ordered to active duty under paragraph (1)" of Article 2(d). 10 U.S.C. § 802(d)(2).

2. Examining other subsections of the statute and applying additional statutory interpretation methods confirms Article 2(d)(2), UCMJ, prohibits ordering SSgt Taylor to active duty for trial on the charged offenses.

A member is not on IDT during the additional periods identified in Article 2(a)(3)(B), UCMJ, 10 U.S.C. § 802(a)(3)(B). This subsection specifies that members of a reserve component are subject to the UCMJ when traveling to and from an IDT training site, during intervals between consecutive periods of IDT on the same day, and during intervals between IDT on consecutive

days, all of which must be pursuant to orders or regulations. *Id.* Congress changed Article 2(a)(3) by adding these periods, a change which took effect on 1 January 2019, but it did not add this language to Article 2(d). *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5102, 5542(a), 130 Stat. 2000, 2894–95, 2967 (2016). Further, Article 2(a)(3) clearly distinguishes between these additional periods and periods when a member is on IDT, stating members of a reserve component are subject to the UCMJ "[w]hile on inactive-duty training and during any of the periods specified in subparagraph (B)." 10 U.S.C. § 802(a)(3)(A). This distinction plainly and unambiguously indicates that being on IDT and the periods specified in Article 2(a)(3)(B) are two different statuses; they are not one in the same simply because both can subject a member to the UCMJ.

The distinction between being on IDT and being in one of the specified periods persists when interpreting Article 2(d)(2), UCMJ, because of the presumption of consistent usage. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170–73 (2012). This canon of statutory interpretation means that "[a] word or phrase is presumed to bear the same meaning throughout a text." *Id.* at 170. Thus, the meaning of "on inactive-duty training" is the same when that phrase is used in two different subsections of the same UCMJ article. Since Article 2(a)(3) plainly distinguishes between being on IDT and being in the periods specified in Article 2(a)(3)(B), the specified periods cannot be included within the meaning of being on IDT in Article 2(d)(2). This bolsters the conclusion that the offenses alleged against SSgt Taylor did not occur while he was on IDT, meaning he may not be ordered to active duty for UCMJ proceedings. 10 U.S.C. § 802(d)(2).

This Court should also not read any additional breadth into Article 2(d)(2), UCMJ, based on perceived legislative intent or history. First, since the statutory language is unambiguous,

interpretation should not go beyond the plain meaning. *Morita*, 74 M.J. at 120. When a statutory text has a plain meaning, consulting legislative history is both unnecessary and disfavored. *See, e.g., Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."). Moreover, the inclusion in Article 2(a)(3), UCMJ, of specified periods beyond when a member is on IDT clearly demonstrates that Congress is aware of both this distinction and how to address it. Yet, Congress did not add any language expanding the exceptions in Article 2(d)(2) to include these periods.

It may seem odd that Congress would make members of the reserve components subject to the UCMJ during the periods specified in Article 2(a)(3)(B), UCMJ, but not allow them to be ordered to active duty for UCMJ proceedings related to offenses committed during those periods, but that is what the statutory text plainly does. This is not an absurd result because it is not "so gross as to shock the general moral or common sense." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021) (declining to apply the absurdity doctrine where possible drafting error in statute of limitations prevented prosecution) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). This Court should not find these to be the "very limited circumstances" in which the absurdity doctrine applies because the plain meaning of the statute is not inconceivable. *Id.* at 380–81. If the prohibition on ordering members of the reserve components to active duty under these circumstances is an error, then it is for Congress, not this Court, to fix it. *E.g., Logan v. United States*, 552 U.S. 23, 35 n.6 (2007) ("enlargement of [a statute] by [a] court, so that what was omitted, presumably by inadvertence, may be included within its scope . . . transcends the judicial function" (alterations in original) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926))); *Lamie*, 540 U.S. at 542 ("It is beyond [the Court's] province to rescue Congress from its

drafting errors, and to provide for what [the Court] might think is the preferred result." (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring))); *McPherson*, 81 M.J. at 378 ("an 'unintentional drafting gap' is insufficient to warrant judicial correction; correction is the province of Congress in cases where an admittedly 'anomalous' result 'may seem odd, but . . . is not absurd'" (alterations in original) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565–66 (2005))). As the law stands, the plain meaning of Article 2(d)(2), UCMJ, is that SSgt Taylor may not be ordered to active duty for UCMJ proceedings because there is no allegation or evidence that he committed the charged offenses while on active duty or IDT.

3. Since SSgt Taylor could not be ordered to active duty, the general court-martial convening authority lacked the authority to involuntarily recall or otherwise order him to active duty.

Because the statute does not allow SSgt Taylor to be ordered to active duty, neither the GCMCA nor any other official had the authority to order him to active duty for UCMJ proceedings related to the charged offenses. As the proceedings progressed, the GCMCA signed a series of memoranda purporting to direct that SSgt Taylor was involuntarily recalled to active duty for various periods corresponding with the UCMJ proceedings, including arraignment and trial. App. Ex. V; App. Ex. X at Attachments 16, 19; App. Ex. XXX; App. Ex. XXXV. Each of these memoranda cited "Title 10, 802(d)," an apparent reference to Article 2(d), UCMJ, 10 U.S.C. § 802(d), as the authority for these recalls. *Id.* As detailed above, this statutory provision did not give the GCMCA authority to order SSgt Taylor to active duty because the text of Article 2(d)(2), UCMJ, limits that authority to offenses committed while the member was on active duty or IDT, which SSgt Taylor was not. The cited statutory authority prohibits the GCMCA from recalling SSgt Taylor, and there is no authority superior to the statute that authorizes such a recall. Thus,

the GCMCA did not have authority to involuntarily recall or otherwise order SSgt Taylor to active duty for trial with respect to the charged offenses.

The approval from the SECAF does not convey additional authority or overcome the limitations in the statute. On 3 June 2021, the Acting SECAF signed a memorandum approving any recall of SSgt Taylor to active duty that the GCMCA might order. App. Ex. VI. The stated purpose of this approval was "to preserve the possibility of confinement or restriction on liberty as a punishment option" pursuant to Article 2(d)(5), UCMJ, 10 U.S.C. § 802(d)(5). App. Ex. VI. This approval does not change the scope of offenses for which the GCMCA can order a member to active duty under Article 2(d)(2), UCMJ. The SECAF's authority, like that of the GCMCA, is subordinate to statutory authority, and the SECAF cannot lawfully authorize a subordinate officer's action that is prohibited by statute. Therefore, the SECAF's approval is of no consequence with respect to the GCMCA's lack of authority to order SSgt Taylor to active duty under Article 2(d), UCMJ.

The consequence of the inability to order SSgt Taylor to active duty is clear. Because SSgt Taylor could not be ordered to active duty for UCMJ proceedings with respect to the charged offenses, the GCMCA's memoranda purporting to involuntarily recall him to active duty could not validly do so. SSgt Taylor was not on active duty prior to arraignment at the general court-martial as is required by the Rules for Courts-Martial. R.C.M. 204(b)(1) ("A member of a reserve component must be on active duty prior to arraignment at a general or special court-martial."). Indeed, since the GCMCA's memoranda were the only evidence purporting to show SSgt Taylor's duty status at the time of trial, there is no evidence indicating he was in any military duty status. Without SSgt Taylor being in the required duty status at the time of trial, the court-martial lacked personal jurisdiction to try him. *See Morgan*, 1999 CCA LEXIS 173, at *6 (noting that only

offenses committed while the accused was on active duty or IDT subject members of the reserve components to court-martial jurisdiction under Article 2(d)(2)). "When challenged, the government must prove jurisdiction by a preponderance of evidence." *Hale*, 78 M.J. at 270 (citing *Morita*, 74 at 121). The Government cannot meet its burden of proving jurisdiction here because the controlling statute does not allow SSgt Taylor to be ordered to active duty for UCMJ proceedings regarding the charged offenses.

<u>4. Since the court-martial lacked jurisdiction over SSgt Taylor, and the Government cannot meet its burden to prove otherwise, this Court should grant appropriate remedies for a lack of jurisdiction.</u>

The jurisdictional defect here is not waived because it cannot be waived. R.C.M. 907(b)(1) ("*Nonwaivable grounds*. A charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense."). Moreover, SSgt Taylor contested the jurisdiction of the court-martial before arraignment. App. Ex. X; R. at 14–15, 20. SSgt Taylor appeared for subsequent proceedings after the military judge denied his motion to dismiss for lack of jurisdiction. App. Ex. XXIX; R. at 21–22. Additionally, jurisdictional errors are not tested for prejudice. *United States v. King*, 83 M.J. 115, 122 (C.A.A.F. 2023) (contrasting jurisdictional errors with administrative errors).

"Without jurisdiction the court cannot proceed at all in any cause." *United States v. Luke*, 69 M.J. 309, 323 (C.A.A.F. 2011) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868)). "A jurisdictional defect goes to the underlying authority of a court to hear a case. Thus, a jurisdictional error impacts the validity of the entire trial and mandates reversal." *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005) (citing *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983)). It was a jurisdictional error to proceed with a general court-martial when SSgt Taylor was not on active duty and could not be ordered to active duty for trial on the charged

offenses, so the findings and sentence of the court-martial are invalid and must be set aside. Further, since SSgt Taylor "may not be ordered to active duty" for UCMJ proceedings with respect to the charged offenses, no court-martial will have jurisdiction over him at the time of trial, so this Court should dismiss the Charge and its Specifications. 10 U.S.C. § 802(d)(2).

WHEREFORE, SSgt Taylor respectfully requests that this Honorable Court set aside the findings of guilty and the sentence and dismiss the Charge and its Specifications.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

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