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) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 25 May 2023

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 Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **2 August 2023**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

KASEY W. HAWKINS, 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,

KASEY W. HAWKINS, 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) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 26 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 September 2023**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his plea, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to receive a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined.

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.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second 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 26 July 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

27 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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.

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 27 July 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 (THIRD)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40441
ZHUO H. ZHONG,	)	
United States Air Force	)	25 August 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third 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 October 2023**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

Undersigned appellate defense counsel was detailed to this case on 25 July 2023 due to the permanent change of assignment of Appellant's previous appellate defense counsel, Maj Kasey Hawkins, effective 31 July 2023. Undersigned counsel previously entered his appearance in this case pursuant to Rule 12 of this Honorable Court's Rules of Practice and Procedure by filing a pleading relative to this case containing his signature on 26 July 2023. A motion to withdraw from Maj Hawkins is expected to be forthcoming.

On 14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his plea, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1,

Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined.

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.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third 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 25 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 NAF, MD 20762-6604

28 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 28 August 2023.

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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 22 September 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 fourth 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 October 2023**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

Undersigned appellate defense counsel was detailed to this case on 25 July 2023 due to the permanent change of assignment of Appellant's previous appellate defense counsel, Maj Kasey Hawkins, effective 31 July 2023. Undersigned counsel previously entered his appearance in this case pursuant to Rule 12 of this Honorable Court's Rules of Practice and Procedure by filing a pleading relative to this case containing his signature on 26 July 2023. A motion to withdraw from Maj Hawkins is expected to be forthcoming.

On 14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his plea, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1,

Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 24 clients; 13 clients are pending initial AOEs before this Court.[1] Seven cases have 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 present oral argument in this case to the U.S. Court of Appeals for the Armed Forces on 25 October 2023.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate

[1] 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 *U.S. v. Taylor*, ACM 40371, 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

exhibits; the transcript is 396 pages. Undersigned counsel has reviewed approximately two-thirds of the record and recently filed a motion to compel production of post-trial discovery in this case.

3) *United States v. Ollison*, ACM S32745 – The record of trial is two volumes consisting of three prosecution exhibits, one defense exhibit, and nine appellate exhibits; the transcript is 142 pages. Undersigned counsel has completed his review of the record and is drafting the assignments of error.

4) *United States v. Brown*, ACM S32747 – The record of trial is three volumes consisting of five prosecution exhibits, 12 defense exhibits, and four appellate exhibits; the transcript is 139 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case, but additional counsel has been detailed to assist with this case and completed his review of the record.

5) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Patterson,* ACM 40426 – The record of trial is eight volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the

transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial 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.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth 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) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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.

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	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (FIFTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40441
ZHUO H. ZHONG,	)	
United States Air Force	)	24 October 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 fifth 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 November 2023**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

Undersigned appellate defense counsel was detailed to this case on 25 July 2023 due to the permanent change of assignment of Appellant's previous appellate defense counsel, Maj Kasey Hawkins, effective 31 July 2023. Undersigned counsel previously entered his appearance in this case pursuant to Rule 12 of this Honorable Court's Rules of Practice and Procedure by filing a pleading relative to this case containing his signature on 26 July 2023. A motion to withdraw from Maj Hawkins is expected to be forthcoming.

On 16 August 2022 and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his plea, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial

(ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 25 clients; 18 clients are pending initial AOEs before this Court.[1] Eight matters have 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 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

[1] 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 in *U.S. v. Taylor*, ACM 40371, 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 .

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.

4) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record in this case.

5) *United States v. Brown*, ACM S32747 – The record of trial is three volumes consisting of five prosecution exhibits, 12 defense exhibits, and four appellate exhibits; the transcript is 139 pages. Undersigned counsel has not yet reviewed the record of trial in this case, but additional counsel has been detailed to assist with this case, has completed his review of the record of trial, and is researching possible assignments of error.

6) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate

exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial 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.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fifth 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 24 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

26 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 26 October 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 40441**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zhuo H. Zhong	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 24 October 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 30th day of October 2023,

ORDERED:

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

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ZHUO H. ZHONG,** United States Air Force, *Appellant.*	)	No. ACM 40441 25 October 2023

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 Air Force Military Justice Law and Policy Division. 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 26 July 2023. Counsel have completed a thorough turnover of the record.

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,

KASEY W. HAWKINS, Maj, USAF
Chief, Military Justice Policy
Military Justice Law and Policy Division (JAJM)
1500 West Perimeter Road, Suite 1130
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 25 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 23 November 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 sixth 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 December 2023**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 16 August 2022 and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his plea, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 18 clients are pending initial AOEs before this Court.[1] Seven matters have priority over this case:

1) *United States v. Gause-Radke*, ACM 40343, USCA No. 24-0028/AF – 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 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, USCA No. 24-0030/AF – 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.

[1] 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, began drafting the AOE in *U.S. v. Taylor*, ACM 40371, 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

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.

4) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record and begun drafting the AOE in this case.

5) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial 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 was

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 sixth 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 23 November 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

27 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 November 2023.

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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 22 December 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 seventh 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 January 2024**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 16 August 2022 and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his plea, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 20 clients are pending initial AOEs before this Court.[1] Five matters have priority over this case:

1) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record and drafted the AOE in this case.
2) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.
3) *United States v. Stafford*, ACM 40131 – The record of trial is 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel is reviewing this Court's

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the supplements to the petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) 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; petitioned the CAAF for review and prepared and filed the supplement to the petition in *U.S. v. Lake*, ACM 40168, USCA No. 24-0047/AF; drafted the AOE in *U.S. v. Taylor*, ACM 40371; and participated in practice oral arguments for three additional cases. Additionally, counsel was on leave

recent opinion in this case in preparation for a potential petition to the CAAF for a grant of review.

4) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial 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 was 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 seventh 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 December 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

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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.

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 27 December 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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 22 January 2024

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 **28 February 2024**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 16 August 2022 and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 20 clients are pending initial AOEs before this Court.[1] Four matters have priority over this case:

1) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.
2) *United States v. Stafford*, ACM 40131 – The record of trial is 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel is preparing to petition the Court of Appeals for the Armed Forces (CAAF) for a grant of review in this case.
3) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.
4) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the AOE in *U.S. v. Taylor*, ACM 40371; reviewed the four-volume record and began drafting the AOE in *U.S. v. Myers*, ACM S32749; and participated in practice oral arguments for two additional cases. Additionally, counsel was off

transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial 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 was 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 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 Government Trial and Appellate Operations Division on 22 January 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

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 has already 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. It appears that Appellant's counsel has not yet begun reviewing 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 23 January 2024.

PETE FERRELL, Lt Col, USAF
Director of Operations
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 40441**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zhuo H. ZHONG	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 22 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 24th day of January, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 February 2024**.

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
Deputy Clerk of the Court

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 40441
ZHUO H. ZHONG,	)	
United States Air Force	)	15 February 2024
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 March 2024**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 317 days have elapsed. On the date requested, 360 days will have elapsed.

On 16 August 2022 and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 30 clients; 19 clients are pending initial AOEs before this Court.[1] Two matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed approximately half of the record of trial in this case.
2) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial 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 was

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the AOE in *U.S. v. Myers*, ACM S32749; petitioned the Court of Appeals for the Armed Forces (CAAF) for a grant of review and prepared and filed the supplement to the petition in *U.S. v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF; prepared and filed a reply to the Government's answer in *U.S. v. Taylor*, ACM 40371; prepared and filed a nine-page motion and a nine-page response to a government motion in *U.S. v. Bartolome*, ACM 22045; reviewed approximately half of the eight-volume record of trial in *U.S. v. Patterson*, ACM 40426; and participated in practice oral arguments for two additional cases. Additionally, counsel was heavily involved in the preparations for the Judge Advocate General's Corps 75th Anniversary Event.

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 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 15 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

20 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 360 days in length. Appellant's over year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet begun reviewing 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 20 February 2024.

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) **ZHUO H. ZHONG,** United States Air Force, *Appellant*.	)	No. ACM 40441
	)	19 March 2024

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, Appellant, Staff Sergeant Zhuo H. Zhong, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Prosecution Exhibit 6, Appellate Exhibits II–V, and transcript pages 45–79 and 105–115 in Appellant's record of trial.

Facts

On 16 August and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* In the course of the proceedings, the court admitted a disk containing three video files as Prosecution Exhibit 6. R. at 236–37; Pros. Ex. 6. The military judge later sealed prosecution Exhibit 6 because it contains sexually explicit material. R. at 359, 479–80.

Additionally, trial defense counsel filed a motion to admit evidence pursuant to Mil. R. Evid. 412 and supplemental evidence for that motion, and the trial counsel and victim's counsel subsequently filed responses. ROT Vol. 2, Exhibit Index. The military judge heard arguments on this motion during a closed Article 39(a), UCMJ, session and issued a verbal ruling during a subsequent closed Article 39(a), UCMJ, session. R. at 44, 103–04. The military judge ordered that the filings related to this motion, which consist of Appellate Exhibits II–V, and the transcript pages from the two closed Article 39(a), UCMJ, sessions be sealed. R. at 80, 116.

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," perform "reasonable diligence," 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." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b) (11

December 2018). These requirements are consistent with those imposed by the state bar to which counsel belongs.[1]

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

The sealed materials consist of a prosecution exhibit and four appellate exhibits, all of which were "presented" and "reviewed" by the parties at trial. R.C.M. 1113(b)(3)(B)(i). 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.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion

[1] Counsel of record is licensed to practice law in Georgia.

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 19 March 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, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40441**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zhuo H. ZHONG	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 19 March 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine Prosecution Exhibit 6, Appellate Exhibits II–V, and transcript pages 45–79 and 105–115 in Appellant's record of trial. These exhibits were reviewed by trial and defense counsel during trial and the transcript pages reflect two closed-session hearings in which trial and defense counsel presented argument.

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* (2024 ed.).

The court finds Appellant has made a colorable showing that review of 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 21st day of March 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 6, Appellate Exhibits II–V, and transcript pages 45–79 and 105–115**, 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	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (TENTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40441
ZHUO H. ZHONG,	)	
United States Air Force	)	19 March 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) 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 April 2024**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 350 days have elapsed. On the date requested, 390 days will have elapsed.

On 16 August and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case. [1]

Counsel is currently representing 29 clients; 18 clients are pending initial AOEs before this Court.[2] Two matters have priority over this case:

1) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to present oral argument as lead counsel in this case on 21 March 2024.
2) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial, including sealed materials, and begun drafting the AOE 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 was

[1] The record of trial contains sealed materials. A consent motion to examine sealed materials is being filed concurrently with this motion for enlargement of time.

[2] Since the filing of Appellant's last request for an enlargement of time, counsel began his review of the four volume record of trial in this case, completed his review of the eight-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Patterson*, ACM 40426; prepared and filed a reply to the Government's answer in *U.S. v. Myers*, ACM S32749; prepared for oral argument, including conducting two practice oral arguments, in *U.S. v. Taylor*, ACM 40371; prepared and filed a citation to supplemental authority with the Court of Appeals for the Armed Forces in *U.S. v. Driskill*, ACM 39889 (f rev), USCA Dkt. No. 23-0066/AF; and participated in practice oral argument and preparation sessions for two additional cases. Additionally, counsel was off 1

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 19 March 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

20 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 390 days in length. Appellant's over year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet begun reviewing 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.

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 20 March 2024.

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 40441**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zhuo H. ZHONG	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

This court held a status conference on 22 March 2024 to discuss the progress of Appellant's case. Ms. Mary Ellen Payne represented the Government, and Major Frederick J. Johnson represented Appellant. Ms. Megan P. Marinos also attended as Senior Counsel for the Appellate Defense Division. Appellant's counsel explained Appellant's case is second in order of priority (behind *United States v. Patterson*, No. ACM 40426, docketed 1 March 2023). Appellant's counsel informed the court that he has begun to review Appellant's case and has his client's permission to request this extension.

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 22d day of March, 2024,

ORDERED:

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

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate another status conference in order for counsel to provide an update of progress on Appellant's case.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant*	)	No. ACM 40441 15 April 2024

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 15 days, which will end on **9 May 2024**. The record of trial was docketed with this Court on 4 April 2023. From the date of docketing to the present date, 377 days have elapsed. On the date requested, 401 days will have elapsed.

On 16 August and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Appellant guilty, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 1 February 2023. The military judge also acquitted Appellant of two specifications of wrongful broadcast. *Id.* The military judge sentenced Appellant to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Zhuo H. Zhong*, dated 20 January 2023.

The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Appellant is not currently confined. Undersigned counsel has reviewed approximately ninety percent of the record of trial, including sealed materials, in this case.

Counsel is currently representing 25 clients; 16 clients are pending initial AOEs before this Court.[1] One matter has priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial, including sealed materials, and has almost completed drafting the AOE 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 was 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.

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[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately eighty percent of the four volume record of trial, including sealed materials, in this case; drafted most of the AOE in *U.S. v. Patterson*, ACM 40426; presented oral argument to this Court as lead counsel and prepared and filed a brief on a specified issue in *U.S. v. Taylor*, ACM 40371; prepared and filed a motion to dismiss in *In re R.R.*, Misc. Dkt. No. 2024-02; and participated in practice oral argument sessions for one additional case. Additionally, counsel was on leave

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 15 April 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

16 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZHUO H. ZHONG, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40441 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 has already consumed almost over 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. It appears that Appellant's counsel has not yet 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.

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 16 April 2024.

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) **ZHUO H. ZHONG,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40441 9 May 2024

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

Assignments of Error

I.

WHETHER THE FINDINGS OF GUILT ARE FACTUALLY INSUFFICIENT WHERE THE EVIDENCE DOES NOT PROVE BEYOND A REASONABLE DOUBT BOTH THAT A VIDEO TAKEN ON OR ABOUT 31 OCTOBER 2021 DEPICTED A PRIVATE AREA OF T.M. AND THAT STAFF SERGEANT ZHONG DID NOT HAVE A REASONABLE MISTAKE OF FACT AS TO CONSENT.

III.

WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN THE GOVERNMENT'S SUBMISSION TO THIS COURT IS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(B).

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN STAFF SERGEANT ZHONG WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION.

Statement of the Case

On 16 August and 12–14 December 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, found Staff Sergeant (SSgt) Zhong guilty, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ),[2] 10 U.S.C. § 920c. R. at 414. The military judge also acquitted SSgt Zhong of two specifications of wrongful broadcast. *Id.* The military judge sentenced Zhong to be reduced to the grade of E-1, confined for two months, and discharged from the service with a bad conduct discharge. R. at 481. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 January 2023.

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).
[2] 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*).

Statement of Facts

SSgt Zhong first met T.M., the named victim in this case, on the dating application Bumble in approximately February 2021. R. at 155. They quickly met in person and began a sexual relationship at the end of February 2021. R. at 156. Over the next two months, they met two more times, engaging in sexual intercourse in SSgt Zhong's bedroom each time they were together. R. at 131, 156–57, 221.

During their third encounter, which took place in April 2021, SSgt Zhong recorded approximately ten videos of the two of them having sex. R. at 162. T.M. was aware SSgt Zhong was recording her while they had sex, knowingly participated in these videos, and continued having sex with SSgt Zhong. R. at 162–64. Afterwards, T.M. saw one of these videos and asked SSgt Zhong to delete it because she did not like the way she looked in the video. R. at 135, 165. SSgt Zhong later told her he deleted it. R. at 137.

SSgt Zhong and T.M. continued to message each other over the next few months, with T.M. at one point expressing a desire for a different type of relationship, saying, "i'm [sic] literally looking for a husband." Pros Ex. 2. T.M. tried to go see SSgt Zhong at one point, but he cancelled when she was about 30 minutes away. R. at 169.

The events for which SSgt Zhong was convicted arose when SSgt Zhong and T.M. next saw each other, on 31 October 2021. R. at 167–68. T.M. went to SSgt Zhong's house, and, after they ate and watched a movie, they did the same thing as the last time they were together back in April 2021: went up to SSgt Zhong's room and began having sex. R. at 167, 170. T.M. testified that she noticed a navy blue or black object out of the corner of her eye after they had been having sex for about 15 minutes. R. at 143, 170–71. She said she saw a flash and heard what sounded like a phone clicking, and she indicated she saw this while she was laying on the bed and SSgt

Zhong was behind her. R. at 143, 171. After this, the two of them continued having sex for about ten more minutes. R. at 172.

Once they finished having sex, SSgt Zhong went to the bathroom for about ten minutes, and T.M. remained in the bedroom. R. at 173. SSgt Zhong's phone was on the bed, and T.M. heard a sound which she believed to be a notification from the application Snapchat. *Id.* She picked up his phone and saw a number of Snapchat notifications, but she was not able to see any photos or videos on his phone. R. at 174. When SSgt Zhong returned from the bathroom, he sat on the bed and began interacting with his phone. R. at 175. T.M. got dressed, gathered her things, and prepared to leave. *Id.* However, T.M. testified she felt something was off, so just before she walked out of the door to his room, she turned to SSgt Zhong and said, "Delete it." R. at 176–77. T.M. recounted that SSgt Zhong seemed to freeze and then start frantically moving his fingers on his phone. R. at 177. She then walked over to him and saw him delete a video. R. at 178. According to her testimony, she observed the video for three to four seconds and saw that the video showed her buttocks and the two of them having sex. R. at 179, 182. T.M. also testified she saw a timestamp that was about 12 minutes earlier, but three days after this incident, she told agents from the Air Force Office of Special Investigations (AFOSI) that the timestamp was two minutes earlier. R. at 179, 183. T.M. saw SSgt Zhong delete this video and then left his house. R. at 145–46.

On her way home, T.M. called 911 and said she thought someone had recorded her while they were having sex and that she did not know if he had other videos of her. R. at 185. Later, she sent SSgt Zhong a text message threatening to "press charges" unless he sent her proof that he did not have any videos of them having sex, in which case she said he would be "off the hook."

Pros. Ex. 2; R. at 193–94. SSgt Zhong responded by sending a screen recording from his phone to show it did not have any videos from 31 October 2021 of them having sex. *Id.*

Three days later, T.M. met with AFOSI agents on 3 November 2021. R. at 183. When describing the video she purportedly saw, she told the agents it was "probably" a video of the two of them. R. at 181. She was more confident by the time of trial, stating that she knew it was her because "I know my backside." R. at 182. T.M. also indicated she wanted to "make [SSgt Zhong] a victim of his consequences" and told the AFOSI agents, "I want you guys to write this down. He has erectile disfunction [sic]." R. at 196.

At the direction of the AFOSI agents, she sent SSgt Zhong a text message saying she was not upset but just wanted to know why he felt comfortable doing "that." Pros. Ex. 3; R. at 194–95. SSgt Zhong responded by saying, "I'm sorry again for doing that without your permission. Guess I thought it was okay since we had before. I've deleted everything so there's none of that." Pros Ex. 3; R. at 195. Despite AFOSI seizing his phone, no video from 31 October 2021 was introduced at trial. R. at 223–24, 408.

AFOSI agents interviewed SSgt Zhong at a later date. R. at 281. During this interview, SSgt Zhong acknowledged taking a video without T.M.'s permission while he and T.M. were having sex. Pros. Ex. 7. He specifically indicated he used the camera application on his phone to record. *Id.* During the interview, SSgt Zhong also identified other people with whom he interacted via the application Snapchat. *Id.* One of these individuals, E.E., ultimately testified that she and SSgt Zhong had a sexual relationship and that she occasionally sent him videos of her having sex with other partners. R. at 291–93.

Argument

I.

THE FINDINGS OF GUILT ARE FACTUALLY INSUFFICIENT BECAUSE THE EVIDENCE DOES NOT PROVE BEYOND A REASONABLE DOUBT THAT A VIDEO TAKEN ON OR ABOUT 31 OCTOBER 2021 SHOWED A PRIVATE AREA OF T.M. OR THAT STAFF SERGEANT ZHONG DID NOT MAKE A REASONABLE MISTAKE OF FACT AS TO CONSENT.

Standard of Review

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

Law and Analysis

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). For offenses occurring after 1 January 2021, the UCMJ specifies this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding."[3] Article 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. § 866(d)(1)(B)(iii) (2024 *MCM*).

[3] This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.). Contrary to the approach of another service court of criminal appeals, this Court does not apply a rebuttable presumption of guilt when assessing factual sufficiency. *Compare id.* at *22, *with United States v. Harvey*, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 2023).

Thus, to set aside a conviction for factual insufficiency, the Court "must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." *Csiti*, 2024 CCA LEXIS 160, at *25.

To meet its burden for the indecent recording specification, the Government was required to prove three elements beyond a reasonable doubt: (1) that SSgt Zhong knowingly recorded the private area of T.M.; (2) that said recording was without T.M.'s consent; and (3) that said recording was made under circumstances in which T.M. had a reasonable expectation of privacy. 2019 *MCM*, ¶ 63(b)(2); DD Form 458, *Charge Sheet*. The statute defines "private area" as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." 10 U.S.C. § 920c(d)(2). Thus, to prove the first element, the Government must prove SSgt Zhong knowingly recorded T.M.'s naked or underwear-clad genitalia, anus, buttocks, areola, or nipple.

While SSgt Zhong acknowledged recording T.M. while they had sex, the evidence does not satisfy the Government's burden of proving he recorded one of her body parts listed in the statute. Pros. Ex. 7. Moreover, the evidence does not prove SSgt Zhong did not have a reasonable mistake of fact as to consent. As a result, SSgt Zhong requests this Court consider whether the finding of guilt for indecent recording is correct in fact and find the evidence is clearly deficient because it does not prove, beyond a reasonable doubt, that the recording in question captured a requisite body part and that SSgt Zhong did not have a reasonable mistake of fact as to consent.

1. The evidence does not prove, beyond a reasonable doubt, that a video from 31 October 2021 depicted T.M.'s private area, which is an element of this offense.

The evidence does not include any video from 31 October 2021. R. at 408 (trial counsel acknowledging that video from October encounter is not in evidence). Without the video, the Court cannot view for itself whether the video captured any of the body parts specified in the indecent recording statute and is left to use testimony and statements describing their recollection

of the video to determine whether the Government has met its burden. None of the evidence introduced at trial established beyond a reasonable doubt that a private area was recorded and, in the absence of evidence to reliably establish that element, SSgt Zhong's conviction must fall.

When interviewed by AFOSI agents, SSgt Zhong acknowledged taking a video while he and T.M. had sex in October, but he never specified any body parts depicted in the video. Pros. Ex. 7. Taking a video during sexual intercourse is not enough by itself to satisfy the elements of indecent recording; the video must capture another person's private area. Further, a video taken while having sex could show one of the participants without showing a private area of that person. This is especially possible when, as here, the person taking the video was positioned behind the other person, who as facing away from the recording device. Considering the relative positions of SSgt Zhong and T.M., the Government did not present evidence foreclosing the possibility that he took a video of her back without her private area. *See* R. at 143. SSgt Zhong's statements to AFOSI leave reasonable doubt as to whether the video from the October encounter depicted T.M.'s private area.

A close examination of T.M.'s testimony and the surrounding circumstances similarly leaves reasonable doubt on this element of the offense. When she testified at trial in December 2022, T.M. expressed confidence she had seen her buttocks when she glimpsed a video for three to four seconds almost 14 months earlier in October 2021. R. at 182. However, she was far less confident three days after the incident when she spoke to AFOSI agents, telling them it was "probably" a video of her and SSgt Zhong. R. at 181. This calls the credibility of her account into question, and a description of what something probably was is not proof beyond a reasonable doubt.

There are other reasonable possibilities for what this video could have been, including a

video that did not depict T.M.'s private area or a video of someone else. T.M. developed some notion of what this video was before she saw it, as evidenced by her testimony that she saw a flash and heard a phone click during sex, felt something was off afterwards, and told SSgt Zhong to "delete it" before receiving any confirmation that a video existed. R. at 143, 171, 176–77. When she ultimately glimpsed the video for three to four seconds, her perception of the video may have been influenced by her preconceived notion of what it would be, which could lead her to think the video depicted her private area even if it did not. Likewise, she could have seen a video of someone else but believed it to be her because of her presumption. Testimony from another witness, E.E., indicated she had occasionally sent SSgt Zhong videos of her having sex with other partners, meaning SSgt Zhong likely had videos showing other adults having sex. R. at 291–93. T.M. could have seen one of these videos depicting another person's buttocks but, in the brief seconds she saw it, perceived it to be a video of her based on her prior presumptions. Both of these possibilities leave reasonable doubt as to the contents of a video taken on or about 31 October 2021 as charged.

Even if T.M. did see her own buttocks in the video, it remains possible that the video she saw was taken previously with her consent. T.M.'s testimony established that SSgt Zhong took approximately ten videos with her knowledge and consent while they were having sex in April 2021. R. at 162–64. However, she only saw one of these videos at the time, which she asked SSgt Zhong to delete. R. at 135, 165. SSgt Zhong could have still had the other videos on his phone, and T.M. may have seen a video showing her buttocks that was taken consensually months earlier. She would not have recognized this video as being months old because she had not seen it before, having only viewed one video at that time. Indeed, it would have been easy for her to mistakenly perceive the video as one that was just taken because on both occasions, they had sex in SSgt Zhong's bedroom. R. at 131. This common setting combined with her preconceived notion of

what was on SSgt Zhong's phone could have led her to mistakenly think the brief portion of a video she saw was from that night when it was actually from months earlier. This possibility gives rise to reasonable doubt that SSgt Zhong recorded a video of T.M.'s private area on the charged date.

Other evidence bolsters the reasonable doubt around this specification. T.M. testified SSgt Zhong became tense and started quickly swiping on his phone when she told him to "delete it," but this reaction would be consistent with all of the possible explanations. R. at 176–77. SSgt Zhong could be understandably concerned that T.M. would be upset if he had a video of them having sex even if it did not depict her private area, and he could likewise not want her to know if he was watching a video of others having sex shortly after they concluded their own sexual encounter. Based on her previous request to delete the only video from April that she saw, he may have also been concerned about her reaction to seeing another one of the consensually-made videos from that occasion. Thus, his purported reaction does not help establish the elements of the charged offense. Similarly, the background between T.M. and SSgt Zhong suggests why she would have been predisposed to think the worst about what was on SSgt Zhong's phone. Although she was explicitly interested in a relationship that could lead to marriage, she found herself repeatedly going to SSgt Zhong's house for sexual encounters and, on at least one occasion, having him cancel their plans when she was already on her way. Pros. Ex. 2; R. at 131, 169. She was also unhappy with how she looked in a previous, consensually-made video. R. at 165. This background could make her plausibly frustrated and suspicious, affecting her perception of a video she only saw for a few seconds.

Finally, her testimony about the timestamp she reportedly saw on the video leaves significant doubt about what that video was. T.M. told AFOSI the timestamp showed the video

was taken two minutes earlier, but at trial, this time changed to 12 minutes. R. at 179, 183. Both of these times are inconsistent with T.M.'s own account of the timeline, in which she noticed SSgt Zhong's phone at least 20 minutes before seeing the video. R. at 172–73. It is possible the time T.M. saw signified something other than when the video was taken. For instance, if SSgt Zhong was watching a video he received from someone else, such as E.E., the timestamp could be when he received the video. This would also be consistent with T.M.'s testimony that she saw Snapchat notifications on SSgt Zhong's phone while he was in the bathroom. R. at 174. T.M.'s account of the timestamp leaves many reasonable possibilities, and it casts significant doubt that she observed a video taken that night which depicted her private area.

Without the video itself, the remaining evidence leaves many reasons to doubt that SSgt Zhong took a video on the charged date that depicted T.M. private area. Thus, the Government has not met its burden of proving every element of the offense beyond a reasonable doubt. This Court should be clearly convinced that the findings of guilt are not supported by the weight of the evidence beyond a reasonable doubt.

2. Evidence indicates SSgt Zhong made a reasonable mistake of fact as to consent.

Although the evidence does not establish whether a video from 31 October 2021 showed T.M.'s private area, SSgt Zhong has acknowledged taking a video that night in both a text message to T.M. and statements to AFOSI. Pros. Exes. 3, 7. However, these same statements give rise to a reasonable mistake of fact as to consent. It is a defense that, as the result of a mistake, SSgt Zong held "an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). On the matter of consent, the mistake must have both existed in SSgt Zhong's mind and been reasonable under all the circumstances. *Id.* The Government bears the burden of proving beyond a reasonable

doubt that such a defense did not exist. R.C.M. 916(b)(1).

Here, SSgt Zhong's text message to T.M. shows his mistake of fact as to consent. When T.M. texted him about this incident, with the help of AFOSI, SSgt Zhong immediately replied that he was sorry and that he thought it was okay since he had done the same thing before. Pros. Ex. 3. SSgt Zhong had no indication AFOSI was involved in this message and was not defending himself against any criminal allegations. Rather, he had reason at this point to be motivated to tell T.M. how he really felt in an effort to salvage his relationship with her. Thus, this statement is a reflection of SSgt Zhong's honest mistake.

Under all of the circumstances, this mistake was objectively reasonable. T.M.'s testimony corroborates the previous, consensual recordings of their sexual activity, indicating SSgt Zhong made ten videos in which she knowingly and willingly participated the last time they had sex. R. at 162–64. The fact they had done the same thing at their very last encounter gave SSgt Zhong reason to believe, albeit mistakenly, that the same would be okay the next time they had sex. Although T.M. indicated she did not like the way she looked in the video she saw and asked him to delete it, she also returned to his house and consented to sexual activity. She did not tell SSgt Zhong she was not ok with recording at all, and comments about being dissatisfied with how she looked do not indicate he should not record again. In a relationship in which the two parties had sex every time they were together, one party recorded ten videos of sexual activity at their last encounter, and the other party objected only to how she looked in one video, not to the recording overall, it was reasonable to think recording would be consensual at their next sexual encounter, even if that belief turned out to be mistaken.

Taking SSgt Zhong's statements and T.M.'s testimony together, SSgt Zhong's belief that her consent included recording a video during sex was a mistake, but it was a reasonable mistake

under the circumstances. The Government has not met its burden of proving otherwise beyond a reasonable doubt. This gives this Court additional reason to be clearly convinced that the finding of guilt was against the weight of the evidence, and the Court should find this conviction factually insufficient.

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

II.

The initial convening order was Special Order A-30, dated 5 July 2022. However, Block V of the charge sheet states the charges were referred to the general court-martial convened by "Special Order-30." DD Form 458, Charge Sheet.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review de novo." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge. 10 U.S.C. § 854. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). A record that is missing exhibits may be substantially incomplete. *See Stoffer*, 53 M.J. at 27 (holding that the record was substantially incomplete for sentencing when all three defense sentencing exhibits were missing). "Insubstantial" omissions from a record of trial do not render the record incomplete. *See Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included). The threshold question is whether the missing exhibits are substantial, either qualitatively or quantitatively. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). Omissions may be quantitatively insubstantial when, considering the entire record, the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (citing *United States v. Nelson*, 3 C.M.A. 482 (C.M.A. 1953)). This Court individually analyzes whether an

omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2); *e.g., United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2-3 (A.F. Ct. Crim. App. Oct. 26, 2022) (explaining R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication and returning the ROT for correction after finding the absence of eight attachments to the stipulation of fact substantial); *United States v. Mardis*, No. ACM 39980, 2022

CCA LEXIS 10, at *9-10 (A.F. Ct. Crim. App. Jan. 6, 2022). R.C.M. 1112(d)(2) states, "A superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction."

In contrast, attachments to the appellate record do not complete the record. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 Jun. 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *Welsh*, 2022 CCA LEXIS 631, at *2 ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *Mardis*, 2022 CCA LEXIS 10, at *7 ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, . . . ; we did not consider the exhibits as a means to complete the record.").

Where a substantial omission exists and the record cannot be completed, a rebuttable presumption of prejudice is raised, and where unrebutted, the appellant may not receive a sentence that includes a punitive discharge. *See Stoffer*, 53 M.J. at 27. Thus, if correction on remand is not possible, the bad-conduct discharge cannot stand.

2. Remand is also warranted to correct the erroneous convening order reference on the charge sheet.

The charge sheet in SSgt Zhong's ROT also contains an error in that it improperly records the order number of the initial court-martial convening order. The convening order was Special Order A-30, but the charge sheet lists it as "Special Order-30." Special Order A-30, 5 July 2022; DD Form 458, Charge Sheet. The correct order number was announced on the record. R. at 15.

SSgt Zhong recognizes this Court has previously found that an erroneous convening order number on a charge sheet "is clerical only and does not impact the jurisdiction of the court or otherwise prejudice the substantial rights of the appellant." *United States v. Admore*, No. ACM S31658, 2010 CCA LEXIS 116, at *1 n.* (A.F. Ct. Crim. App. Feb. 19, 2010). However, this is an error on the charge sheet, one of the central documents to this court-martial. Especially since the ROT contains substantial errors that need to be corrected, the Court should also direct the correction of this error.

WHEREFORE, SSgt Zhong respectfully requests this Honorable Court remand this case pursuant to R.C.M. 1112 and, if the record cannot be completed, disapprove the bad-conduct discharge.

III.

THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL TO THIS COURT DOES NOT TOLL THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNTIED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN THE GOVERNMENT'S SUBMISSION TO THIS COURT IS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(B).

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

"Each general . . . court-martial shall keep a separate record of the proceedings in each case brought before it." R.C.M. 1112(a). The record "shall" include, inter alia, "any appellate exhibits." *Id.* at (b)(6). As articulated in SSgt Zhong's second assignment of error, the record in this case is substantially incomplete because Attachments 1, 2, and 4 to App. Ex. II do not match

their respective descriptions on the record, meaning they were not included either in whole or in part. Without the proper attachments, App. Ex. II was not included in its entirety.

Courts of Criminal Appeals (CCAs) are expected to exercise "institutional vigilance" for the "disposition of cases docketed" before them. *Moreno*, 63 M.J. at 137. One reason for this expectation is that "[d]ue process entitles convicted service members to a timely review and appeal of court-martial convictions." *Id.* at 132 (citation omitted). An appeal that is "inordinately delayed is as much a meaningless ritual as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Id.* at 135 (quotations and citations omitted). This Court's intervention here would safeguard appellants' right to timely appellate review, reaffirm the Government's statutory and regulatory obligations to compile complete ROTs, and allow this Court to complete its duties under Article 66, UCMJ, and allow appellate defense counsel to complete his duties under Article 70, UCMJ. *See* 10 U.S.C. §§ 866, 870; *Cf. United States v. Tate*, 82 M.J. 291, 298 (C.A.A.F. 2022) (holding that the Army CCA could not perform its Article 66, UCMJ, function without knowing exactly what aggravating evidence the military judge considered, where the military judge relied upon unrecorded testimony).

This Court should view these directives alongside *Moreno*'s mandate, which compelled the Government to docket the ROT at a CCA within 30 days of action to avoid a presumption of facially unreasonable delay. *Moreno*, 63 M.J. at 142. Because of changes to the *Manual for Courts-Martial*, this Court updated that standard in *United States v. Livak*, finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in Moreno." 63 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

The Government's failure to meet *Livak's* deadline of 150 days triggers an analysis of the

four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The *Barker* factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citing *Barker*, 407 U.S. at 530). When examining the reason for the delay this Court determines "how much of the delay was under the Government's control [and] assess[es] any legitimate reasons for the delay…." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors").

In *United States v. Gammage*, this Court remanded the appellant's ROT twice for correction; however, in resolving whether the incomplete ROT tolled the presumption of post-trial delay, "decline[d] to create a new requirement for cases that are docketed, remanded, and later redocketed with this court," finding "the original standards announced in *Moreno*, and its progeny, adequately protect an appellant's due process right to timely post-trial and appellate review." No. ACM S32731 (f rev), 2023 CCA LEXIS 528, at *6 (A.F. Ct. Crim. App. Dec. 15, 2023) (quotations and citations omitted). This finding incentivizes the Government to docket incomplete records within the required 150 days to toll the presumption of unreasonable delay and merely meet processing deadlines, when all the while the Appellants' review cannot be effectively accomplished until corrected, and that review is unreasonably delayed as a result.

This Court should instead find that the docketing of an incomplete record does not toll the presumption of unreasonable delay, incentivizing the Government to exercise due care in ensuring it compiles a complete and accurate record when it has consistently failed to docket complete ROTs before this Court.[4] The Government has approximately five levels of review to ensure the

[4] *See, e.g.*, *Gammage*, 2023 CCA LEXIS 528 (requiring a second remand for noncompliance with initial remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct.

ROT is compiled correctly: the base legal office, the court reporter, the numbered Air Force, the Military Justice Law & Policy Division (JAJM), and the Government Trial and Appellate Operations Division (JAJG).

The United States Court of Appeals for the Armed Forces (CAAF) was mindful in *Moreno* "of the importance of providing a deterrent to improper Government action, including actions that delay post-trial and appellate processing," and this Court should be similarly mindful here as well. 63 M.J. at 142 n.22. Finding that the docketing of an incomplete ROT does not toll the presumption of unreasonable delay is in line with *Moreno*, would comport with judicial minimalism given that the omission must be a required item under R.C.M. 1112(b), and requires no process change—only more attention to detail to ensure ROTs are complete the first time they are compiled and docketed. "[S]ervicemembers have a due process right to timely review and appeal of courts-martial convictions" and this Court's exercise of its institutional vigilance will serve to protect that right. *Id.* at 135.

Finally, this Court has authority under Article 66, UCMJ, to grant sentence relief for excessive post-trial delay without a showing of actual prejudice under Article 59(a), UCMJ. 10 U.S.C. §§ 859, 866; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted). The regular docketing of incomplete records leads to unreasonable delay which adversely affects

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Crim. App. Dec. 5, 2023) (remand order); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. Sep. 11, 2023) (remand order); *United States v. Gonzalez*, No. ACM 40375, 2023 CCA LEXIS 378 (A.F. Ct. Crim. App. Sep. 8, 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. Aug. 1, 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. Jun. 27, 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. Jun. 15, 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. Jun. 5, 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. May 31, 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. May 12, 2023) (remand order).

the public's perception of the fairness and integrity of the military justice system. SSgt Zhong requests this Court recognize this impact and grant him meaningful relief by disapproving his bad conduct discharge.

WHEREFORE, SSgt Zhong respectfully requests this Honorable Court disapprove the bad conduct discharge.

IV.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" BECAUSE STAFF SERGEANT ZHONG WAS CONVICTED OF A NON-VIOLENT OFFENSE, AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.).

Additional Facts

The first indorsements to both the Entry of Judgment and Statement of Trial Results state that SSgt Zhong is subject to a "Firearm Prohibition Triggered Under 10 U.S.C. § 922." Entry of Judgment, 1 February 2023; Statement of Trial Results, 14 December 2022.

Standard of Review

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

Law and Analysis

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 597 U.S. at 24 (citation omitted).

Last year, the Fifth Circuit decided a case in which the appellant was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *United States v. Rahimi*, 61 F.4th 443, 448–49 (5th Cir. 2023), *cert granted*, ___ U.S. ___, 143 S. Ct. 2688 (2023). The appellant agreed to this domestic violence restraining order. *Id.* at 452. Vacating this conviction, the court held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *Id.* at 461 (citation omitted).

In reaching its conclusion, the Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 450 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452. Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of the non-violent offense of indecent recording. *Id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm

regulation." *Id*. at 460. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed upon domestic violence restraining order violation, then it likely cannot prove that its firearm prohibition on SSgt Zhong for a non-violent offense would be constitutional.

A further problem with the Statement of Trial results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that SSgt Zhong fell under the firearm prohibition. Notably, the Court did not convict him of an offense relating to him being "an unlawful user of or addicted to any controlled substance." 18 U.S.C. 922(g)(3). Thus, SSgt Zhong is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it could not be the domestic violence or drugs sections given the facts of his case. Regardless, given the non-violent nature of the facts of his case, and *Rahimi*'s holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *United States v. Lepore*, citing the 2016 edition of the Rules for Courts-Martial, this Court held, "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) (unpub. op.). In that decision, the CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." *Id.* at n.*. The CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is in contravention to this Court's holding in *Lepore*.

Logically, the CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to correct administrative errors in promulgating orders—even via unpublished decisions—regardless of whether the initial requirement was a collateral consequence like sex offender registration or firearms prohibition. Second, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then they also have the power to address constitutional errors in promulgating orders even if the Court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from the instant case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized that the firearms prohibition was "not required by the Rules for Courts-Martial" as a basis for not having authority to take corrective action. *Id.* at 763. The new 2019 rules that apply in this case, however, contain language that both the Statement of Trial Results and the Entry of

Judgment contain "[a]ny additional information…required under regulations prescribed by the Secretary concerned." Rules for Courts-Martial (R.C.M.) 1101(a)(6); 1111(b)(3)(F). Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required that the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination of whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative correction of paperwork, but an issue of constitutional magnitude.

WHEREFORE, SSgt Zhong respectfully requests that this Honorable Court find the Government's firearm prohibition is unconstitutional and order that the Government correct the Statement of Trial Results and Entry of Judgment as necessary.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 May 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO FILE UNDER SEAL**
Appellee	)	
	)	Before Panel No. 2
v.	)	
	)	No. ACM 40441
Staff Sergeant (E-5)	)	
ZHUO H. ZHONG,	)	9 May 2024
United States Air Force	)	
Appellant	)	

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

Pursuant to Rules 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant, by and through counsel, moves to file under seal the following portions of the Brief on Behalf of Appellant: statement of Assignment of Error II found on page 1 and portions of the argument, additional facts, and law and analysis sections for Assignment of Error II found on pages 13–15. These portions address a sealed appellate exhibit (App. Ex. II) and its attachments as well as sealed portions of the transcript (R. at 51–52, 105–15).

The above referenced portions will be delivered in hard copy to the Court, the Government Trial and Appellate Operations Division, and the Military Justice Law and Policy Division. The unsealed filing, redacted to identify which portions have been filed under seal in accordance with Rule 17.2(b), is being filed separately via email on 9 May 2024.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion to file under seal.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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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 9 May 2024.

Respectfully Submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5) **ZHUO H. ZHONG,** United States Air Force *Appellant.*	)))))))))	**UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO FILE UNDER SEAL** Before Panel No. 2 No. ACM 40441 16 May 2024

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

Pursuant to the Rules of Practice and Procedure for this Honorable Court, the United States opposes Appellant's request to file under seal the following portions of the his brief: statement of Assignment of Error II found on page 1 and portions of the argument, additional facts, and law and analysis sections for Assignment of Error II found on pages 13-15.

Although portions of Appellant's brief cited materials filed under seal, such as Appellate Exhibit II and parts of the sealed transcript, the brief did not discuss the content of the sealed materials. Unnecessarily filing portions of a brief under seal will make more cumbersome for the parties and this Court to handle this appeal. Rule 17.2 of this Court's Rules of Practice and Procedure explains that material under seal or information derived from such material shall be separately filed in accordance with Rule 13.2(b). The portions of the brief that Appellant filed under seal simply argued that there were portions of the record of trial that were missing, and certain exhibits in the record of trial did match the descriptions articulated in the record. Appellant never discussed sealed materials or information "derived from" sealed materials, and his brief reveals no information of a sensitive nature that would need to be filed under seal.

The Exhibit Index contained in the record of trial, which was not sealed, detailed each exhibit, including exhibits filed under seal, and listed out the type of exhibit, date, page numbers. (ROT, Vol. 2.) Appellant's brief filed under seal was no different. It is less than three pages referencing exhibit names and type of exhibits, short of ever discussing the content of the sealed materials. Thus, no portion of Appellant's brief should be filed under seal because the content of the sealed materials was not discussed in his brief and no sensitive information was discussed.

WHEREFORE, the United States opposes Appellant's motion to file under seal.

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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 16 May 2024.

VANESSA BAIROS, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40441**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zhuo H. ZHONG	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 9 May 2024, counsel for Appellant submitted a Motion to File Under Seal certain portions of Appellant's Assignments of Error brief, also dated 9 May 2024. Specifically, Appellant requests portions of pages 1 and 13–15 be sealed. The Government opposes the motion.

We commend counsel for Appellant for erring on the side of caution when interpreting Rule 17.2(b) of this court's Rules of Practice and Procedure. However, as the Government argued and the court agrees, Appellant's brief cites materials that are sealed, but "did not discuss the content of the sealed materials."

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure, and for the reasons stated above, denies Appellant's motion. The attachment to Appellant's Motion to File Under Seal will appear in the record of trial unsealed.

Accordingly, it is by the court on this 17th day of May, 2024,

ORDERED:

Appellant's Motion to File Under Seal 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,*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZHUO H. ZHONG** United States Air Force, *Appellant.*	)	No. ACM 40441 28 May 2024

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 7-day enlargement of time, to respond in the above captioned case. The United States withdraws its previous request for an enlargement of time dated 22 May 2024. This case was docketed with the Court on 4 April 2023. Since docketing, Appellant has been granted eleven enlargements of time. Appellant filed his brief with this Court on 9 May 2024. This is the United States' first request for an enlargement of time. As of the date of this request, 421 days have elapsed since docketing. The United States' response in this case is currently due on 8 June 2024. If the enlargement of time is granted the United States' response will be due on 15 June 2024, and 439 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. Appellant filed his brief on 9 May 2024, and undersigned counsel was on preapproved overseas leave from

. On 20 May 2024 undersigned counsel was assigned to this case. Undersigned counsel is also currently assigned to United States v. Murray, an Article 62 appeal pending before this Court. The Appellee's answer to the government's Article 62 appeal is due 26 May 2024 and the

government's reply brief is due seven days after the filing of Appellee's answer. This case is counsel's second priority after United States v. Murray. In the past thirty days, undersigned counsel was on international leave for eleven days, filed a 44-page Article 62 appeal with this Court, and a 12-page one issue brief with this Court in United States v. Donley. The thirty-day time period authorized for the United States to submit its answer brief includes a federal holiday with two associated non-duty days. The trial transcript in this case is 442 pages and the record of trial is comprised of four volumes containing 14 prosecution exhibits, 11 defense exhibits, and 12 appellate exhibits. Appellant has raised four assignments of error in a 65-page brief (including Appendix).

An extension of time is necessary to allow undersigned counsel adequate time to complete work on the pending Article 62 appeal, and then to prepare an adequate response for the above-styled case. In the time undersigned counsel has been assigned to this case, counsel has reviewed Appellant's claims and reviewed the trial transcript. There is no other appellate government counsel who would be able to file a brief sooner because they are also assigned briefs with similar due dates to this case.

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

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MARY ELLEN PAYNE
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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 28 May 2024.

TYLER L. WASHBURN, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40441**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zhuo H. ZHONG	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 28 May 2024, counsel for the Government submitted a Motion for Enlargement of Time (First) requesting an additional 7 days to submit Government's answer to Appellant's assignments of error. Appellant did not submit an opposition. The Government asserts, "As of the date of this request, 421 days have elapsed since docketing. The United States' response in this case is currently due on 8 June 2024. If the enlargement of time is granted the United States' response will be due on 15 June 2024, and 439 days will have elapsed since docketing."

The court has considered Appellee's motion, case law, and this court's Rules of Practice and Procedure. We note that the United States' response will be due 438 days after docketing, not 439 days as the Government asserted and that 420 days had elapsed since docketing at the date of Government's request.

Accordingly, it is by the court on this 4th day of June, 2024,

ORDERED:

Appellee's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **15 June 2024**.

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*,	)	
	)	**UNITED STATES'**
	)	**ANSWER TO ASSIGNMENTS**
v.	)	**OF ERROR**
	)	
	)	Before Panel No. 2
Staff Sergeant (E-5)	)	
ZHUO H. ZHONG,	)	
United States Air Force	)	No. ACM 40441
Appellant.	)	
	)	17 June 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **ZHUO H. ZHONG**, United States Air Force *Appellant.*	)))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** No. ACM 40441 Before Panel No. 2 17 June 2024

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILT ARE FACTUALLY INSUFFICIENT WHERE THE EVIDENCE DOES NOT PROVE BEYOND A REASONABLE DOUBT BOTH THAT A VIDEO TAKEN ON OR ABOUT 31 OCTOBER 2021 DEPICTED A PRIVATE AREA OF T.M. AND THAT STAFF SERGEANT ZHONG DID NOT HAVE A REASONABLE MISTAKE OF FACT AS TO CONSENT.

II.

WHETHER STAFF SERGEANT ZHONG'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE BECAUSE THE ATTACHMENTS TO APPELLATE EXHIBIT II DO NOT MATCH THE RESPECTIVE DESCRIPTIONS ON THE RECORD, MEANING PART OR ALL OF THE TRUE ATTACHMENTS ARE NOT INCLUDED.

III.

WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER UNITED STATES V. MORENO, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN THE GOVERNMENT'S SUBMISSION TO THIS COURT IS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(B).

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. §922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN STAFF SERGEANT ZHONG WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION.

STATEMENT OF THE CASE

On 16 August 2022 and 12-14 December 2022, a general court-martial convened at Seymour Johnson AFB, North Carolina. Appellant elected trial by military judge alone and entered pleas of not guilty. (*Entry of Judgment*, dated 1 February 2023, ROT, Vol. 1.) Contrary to his pleas, the military judge found Appellant guilty of one charge and specification of indecent recording, in violation of Article 120c, UCMJ. (Id.; R. at 414.) Appellant was acquitted of one charge and two specifications of wrongful distribution of intimate visual images. (R. at 414.) All the charged specifications involved the same victim, TM. (*Charge Sheet*, dated 19 May 2022, ROT, Vol. 1.) The military judge sentenced Appellant to a reduction to the grade of E-1, two months confinement, and a bad conduct discharge. (R. at 481.) The convening authority took no action on the findings or sentence. (*Convening Authority Decision on Action*, dated 20 January 2023, ROT, Vol. 1.)

The specification as charged under Article 120c, UCMJ, states that Appellant "did, at or near Goldsboro, North Carolina, on or about 31 October 2021, without legal justification or lawful authorization, knowingly made a recording of the private area of Ms. [TM] without her consent and that the recording was made under circumstances in which Ms. [TM] had a reasonable

[1] N.Y State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

expectation of privacy. (*Charge Sheet*, ROT, Vol. 1).

STATEMENT OF FACTS

Initial Interactions Between TM and Appellant

TM met Appellant through an electronic dating application known as Bumble in February 2021. (R. at 128, 155.) After connecting through Bumble, TM met Appellant in person on 25 February 2021. (R. at 129, 155.) TM and Appellant began a consensual casual sexual relationship that lasted from February 2021 to October 2021. (R. at 130, 156.) In total, Appellant and TM engaged in sexual intercourse on four separate occasions: once in February, March, April, and October, respectively. (R. at 156.) Each of these sexual encounters occurred in Appellant's bedroom on the second floor of his home. (R. at 130-131.) Prior to having sex, TM would ensure the blinds on Appellant's window were drawn, so they could not be viewed from the outside. (R. at 132.) TM and Appellant never had sex in any of the common areas of the home because Appellant had roommates, and TM did not want anyone to walk in on them. (R. at 133.) During the March visit, Appellant asked TM if he could record their sexual encounter. (R. at 134.) Appellant suggested he could post the video to OnlyFans[2] or PornHub[3] and they could both make money from it. (R. at 134, 157-158.) TM was shocked by Appellant's suggestion and declined to be recorded. (R. at 134-135.)

[2] OnlyFans "is a social media website that primarily features adult-entertainment content, where 'Fans' pay for content created by 'Content Creators.'" The site pays the "Content Creators a set percentage of the subscriptions and purchases made by site visitors." Doe v. Fenix Internet, LLC., No. 1:21-cv-06624, 2024 U.S. Dist. LEXIS 99859 (N.D. Ill. June 5, 2024).

[3] PornHub is a Canadian-owned internet pornography site. PornHub "is a tube site, meaning much of the site's content comes from individual users who create pornographic videos or images and upload them" to the site. PornHub offers uploaders "the opportunity to share in the advertising revenue from the content they upload." Doe v. MG Freesites, Ltd., No. 7:21-cv-00220-LSC, 2023 U.S. Dist. LEXIS 225699 (N.D. Ala. Dec. 19, 2023).

April Recordings

In April 2021, TM changed her mind and allowed Appellant to use his phone to record ten video clips of TM and himself having sex. (R. at 135, 162.) TM knew Appellant was recording, and she could see the camera the entire time Appellant was recording. (R. at 162-163.) After Appellant was done recording, he showed one of the videos to TM. (R. at 164-165.) TM told Appellant that she was uncomfortable and asked him to delete the videos because she didn't like the way she looked. (R. at 136, 165.) TM told Appellant "[h]ey, yeah, just make sure you delete those," multiple times before she left his home. (R. at 136.) After driving approximately an hour to her home, TM messaged Appellant again requesting he delete the videos. (R. at 137.) Appellant did not initially respond to TM's initial message, prompting her to message "[h]ello, you did not respond. Just making sure you deleted everything." (R. at 137.) Appellant responded "[y]es, of course, I've already deleted it." (R. at 137.)

October 2021 Incident

After this incident, TM did not see Appellant until 31 October 2021. (R. at 138.) On 31 October 2021, Appellant invited TM over to meet his puppy. (R. at 140, 168.) TM was apprehensive about seeing Appellant after the April incident, but decided to go because this visit was not about being intimate. (R. at 140-142, 168.) After arriving at Appellant's home, TM went inside and spent time with his puppy. (R. at 142.) Appellant and TM then left the home to go shopping and get take-out food. (Id.) They then returned to Appellant's home and had dinner on his couch. (Id.) After they finished eating, they began to kiss and Appellant asked TM if she wanted to have sex. (Id.) TM was reluctant and questioned Appellant about being intimate, as that was not the purpose of them meeting. (R. at 142-143.) After some discussion, Appellant suggested that they move upstairs if they were going to have sex because his roommates might

return home. (R. at 142.) TM decided to go upstairs with Appellant, and they started to have sex. (R. at 143.) At some point during the sexual intercourse, TM began to feel uneasy. (Id.) TM was positioned on her stomach laying on the bed and Appellant was standing behind her when she saw a flash of light. (Id.) She turned her head to look behind her and saw something in Appellant's hand. (Id.) Appellant moved his hand quickly, and TM wasn't sure what she had seen. (Id., R. at 170-171.) TM believed Appellant had his phone or a recording device but wasn't certain because of how quickly he had moved it when she turned her head, although she believed she heard the sound of a phone locking. (R. at 143-144, 171.) Due to her uncertainty, she did not confront immediately confront Appellant. (R. at 144.)

After they finished having sex, Appellant went to the bathroom, and TM heard his phone repeatedly "pinging" with a sound TM recognized as the notification alert for the application Snapchat[4]. (R. at 172, 174.) TM's suspicions grew further, and she unsuccessfully attempted to access his phone to see if there were any recordings. (R. at 144.) Appellant returned from the bathroom, laid down on the bed and became focused on his phone screen. (Id., R. at 175.) TM's suspicions peaked, and as she went to leave, she told Appellant to "[d]elete it." (R. at 144, 175.) Appellant's body froze momentarily and he then began to frantically swipe on his phone screen. (R. at 144, 177.) Appellant responded "[i]t was only on Snapchat." (R. at 180.) TM then said, "[n]o, I need to make sure that you delete it." (R. at 180.) TM approached him and as she was standing next to him, she saw him select a video on his phone. (R. at 178.) As she watched, the video began playing in the SnapChat application for approximately three to four seconds before Appellant deleted it. (R. at 179.) The video was timestamped, and TM believed the timestamp

[4] Snapchat is "'a widely popular photo sharing application' that allows users to exchange photos and messages and engage in video chats with one another." L.W. v. Snap, Inc., 675 F. Supp. 3d 1087 (S.D. Cal. 2023).

stated it was taken approximately 12 minutes prior. (R. at 179.) TM was certain the video depicted her unclothed buttocks and depicted the sexual encounter they had just engaged on based on her positioning in the video. (R. at 145-146, 182.)

After confirming Appellant deleted the video, TM left his home and began to drive to her residence. (R. at 146.) During the drive, she called and reported the incident to the local police department. (R. at 146.) TM then contacted Appellant and requested he take a screen recording of his phone's camera roll to ensure that he had fully deleted the video. (R. at 147.) Appellant complied with TM's request and then texted "[s]orry for violating your privacy." (R. at 149, Pros. Ex. 3.)

After the Air Force Office of Special Investigations (OSI) were notified and began their investigation, TM sent another text message to Appellant confronting him about why he recorded them without her permission. (R. at 149.) Appellant replied "[I]'m sorry, again, for doing that without your permission, I guess, I thought it was okay, since we have before." (R. at 149-150, Pros. Ex. 3.)

Appellant's Interview with OSI

Appellant was interviewed by OSI on 23 November 2021. (R. at 339.) During the interview Appellant confirmed that he had previously consensually recorded himself and TM having sex and that she had asked him to delete them because she didn't like the way she looked. (Pros. Ex. 7 at approx.. 00:41:50-00:42:05.) OSI agents then asked Appellant how many other times he recorded himself having sex with TM. (Id. at approx. 00:42:05-00:42:10.) Appellant indicated once, and OSI asked "it was only a one time thing?" (Id. at approx. 00:42:10.) Appellant stated "with her permission, yep." (Id. at approx. 00:42:15.) Appellant then admitted that he had recorded a sexual encounter between himself and TM without her permission on one

occasion. (Id. at approx. 00:42:18-00:42:20.) Appellant stated that had occurred a couple of weeks prior to his 23 November 2021 interview, but he could not recall a specific date. (Id. at approx.. 00:42:25-00:42:50.)

ARGUMENT

I.

APPELLANT'S CONVICTION FOR INDECENT RECORDING IS FACTUALLY SUFFICIENT, AND ANY MISTAKE OF FACT AS TO CONSENT WAS OBJECTIVELY UNREASONABLE.

Standard of Review

Under Article 66(d), UCMJ, the Court of Criminal Appeals reviews issues of factual sufficiency de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)).

Law

Factual Sufficiency

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency uses the following standard if all offenses occurred on or after 1 January 2021[5]:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

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

> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 USCS § 866(d)(1)(B).

Court of Appeals for the Armed Forces granted review of whether there is a rebuttable presumption of guilt on appeal. The Navy-Marine Court of Criminal Appeals (NMCCA) held "that the revised statute requires a departure from the prior practice, and the standard for factual sufficiency has become harder for an appellant to meet." United States v. Harvey, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 23 May 2023), rev. granted, 2024 C.A.A.F. LEXIS 13 (C.A.A.F. 10 Jan. 2024). The Harvey court then explained:

> It is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial.

Id. According to the N.M.C.C.A., "Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty." Id.; *But see* United States v. Scott, 83 M.J. 778, 780-81 (A. Ct. Crim. App. 27 Oct. 2023) (rejecting Harvey's creation of rebuttable presumption of guilt on appeal); *see also* United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, *21 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.) (also declining to adopt the rebuttable presumption created in Harvey).

Indecent Recording, Article 120(c), UCMJ

A conviction for indecent recording in violation of Article 120c, UCMJ, requires the government to prove three elements beyond a reasonable doubt: (1) "the accused knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;" (2) "said recording was without the other person's consent;" and (3) "said recording was made under circumstances in which the other party had a reasonable expectation of privacy." Manual for Courts-Martial, pt. IV, ¶ 63.(b)(2) (2019 ed.) (MCM).

The term "private area" is defined as "the naked or underwear clad genitalia, anus, buttocks, or female areola or nipple. MCM, pt. IV, ¶ 63.(a)(d)(2).

Consent means:

> A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

MCM, pt. IV, ¶ 60(b)(7)(A).

All the surrounding circumstances are to be considered in determining whether a person gave consent. MCM, pt. IV, ¶60(b)(7)(C).

Analysis

Appellant challenges the first element of his indecent recording conviction. (App. Br. at 7.) The remaining elements are uncontested. TM, the named victim testified that she saw the video Appellant recorded on 31 October 2021 and was clearly able to identify her nude buttocks in the video. (R. at 178-179, 145-146, 182.) Thus, the first element was satisfied. Further, Appellant asserts the government failed to prove beyond a reasonable doubt that he did not have a reasonable mistake of fact. (App. Br. at 11.) Appellant conceded during his interview with

OSI that he recorded TM without her permission. (Pros. Ex. 7 at approx. 00:42:18-00:42:20.) When all of the surrounding circumstances are considered, any mistake of fact Appellant may have had was objectively unreasonable. Therefore, the defense is unavailable to the Appellant.

A. The government proved Appellant recorded a video depicting TM's private area on 31 October 2021 beyond a reasonable doubt. Thus, Appellant's conviction is factually sufficient.

The test for factual sufficiency is whether this Court is "clearly convinced that the finding of guilty was against the weight of the evidence." United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, *21 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.). Under this test, the Appellant must make "a specific showing of a deficiency of proof." Id. at *17.

Appellant asserts the government failed to establish that the recording captured a part of TM's body that fits within the definition of "private area" as defined by Article 120c, UCMJ. (App. Br. at 7.) The term "private area" is defined as "the naked or underwear clad genitalia, anus, buttocks, or female areola or nipple. MCM, pt. IV, ¶ 63.(a)(d)(2). The government proved this element beyond a reasonable doubt at trial.

TM reliably testified that after she told Appellant to "delete it," Appellant replied "[i]t was only on Snapchat." (R. at 144, 177, 180.) TM then told Appellant she needed to make sure he deleted it. (R. at 180.) TM approached Appellant and saw him select a specific video on his phone. (R. at 178.) After Appellant selected the video, TM was able to view approximately three to four seconds of the video before Appellant deleted it. (R. at 179.) She observed a timestamp on the video that indicated the video had been taken approximately 12 minutes prior. (R. at 179.) During the three to four seconds she viewed the video, TM was able to identify that the video depicted her unclothed buttocks, and it showed the sexual encounter they had just engaged in based on her positioning. (R. at 145-146, 182.) When confronted by trial defense

counsel TM was unequivocal "[you] can only see my backside. And I know my backside." (R. at 182.) TM's testimony alone was sufficiently reliable to establish the recording captured TM's "private area" beyond a reasonable doubt.

Appellant attempts to attack TM's credibility by mischaracterizing her statements to OSI: "[S]he was far less confident three days after the incident when she spoke to AFOSI agents, telling them it was 'probably' a video of her and [Appellant]." (App. Br. at 8.) But Appellant fails to give proper context to this statement. During her interview, OSI asked TM if Appellant showed up in the recording or whether it was just her. (R. at 181.) TM stated that "[i]t probably was both of us, because it was doggy so I was—it was probably him and me." TM may not have been confident that Appellant was also depicted in the video, but she was certain that her nude buttocks was in the recording. (R. at 145-146, 182.) This Court should be unconvinced by Appellant's attempts to attack TM's credibility.

Appellant argues that without the video of the actual recording, the government has failed to meet its burden. (App. Br. at 7-8.) But this argument fails. Our superior Court has held "the testimony of a single witness may be sufficient to establish guilt beyond a reasonable doubt so long as the trier of fact finds the witness's testimony sufficiently reliable." United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006). During TM's trial testimony, the miliary judge was able to view her facial expressions, postures, and bodily movements, and hear her vocal tones, volume, and cadence, and in his guilty verdict he inherently found TM credible. This is further evidenced by the fact the military judge cited TM's testimony when he denied Appellant's R.C.M. 917 motion at trial:

> During her testimony, [TM] testified that she had seen something out of the corner of her eye, when engaging in sexual intercourse with the accused. That she believed she [saw] a flash, and something blue or black out of the corner of her eye. That ultimately

> after sexual intercourse had concluded she told the [Appellant] to delete it. And that she also saw three to four seconds of the video, where she could see her butt or her backside.

(R. at 340.) This Court is required to afford "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Csiti, unpub. op. at 19 (citing 10 USCS § 866(d)(1)(B)). Therefore, this Court should be satisfied that TM's testimony alone was sufficiently reliable to sustain Appellant's conviction for indecent recording.

Appellant asserts there are other reasonable possibilities for what the recording could have shown: (1) the video may have depicted only TM's back, (2) she may have seen a video of someone else, (3) the video may have been one previously recorded without her consent. (App. Br. at 8-9). These arguments do not withstand scrutiny.

First, Appellant's suggestion that the video may have only showed TM's back is contrary to TM's unequivocal testimony that it depicted her unclothed buttocks. (R. at 182.) Moreover, the surrounding circumstantial evidence undercuts Appellant's argument. During Appellant's OSI interview, he stated that he began recording "mid-sex" while they were in a position he described as "doggie style." (R. at 339.) Appellant's statements are consistent with TM describing that she was on her stomach on the bed while Appellant was standing behind her. (R. at 143.) Given Appellant's prior suggestion that they record themselves having sex and post it to two pornographic websites, it is implausible that the focus of the video was on TM's back and not on the sex act itself, which would have naturally included a view of TM's buttocks. (R. at 134, 157-158.)

Second, Appellant's claim that the video may have been of someone else or was one of the consensually recorded videos from their April encounter is inconsistent with his own version of events. (App. Br. at 8-9.) Appellant stated he had recorded TM without her permission a

"couple of weeks" prior to his 23 November 2021 interview. (R. at 339.) OSI agents asked Appellant whether TM saw him when he recorded her, and he responded, "I guess she did, afterwards she told me to see it and then delete it." (R. at 340.) This corroborates TM's testimony, that (1) she saw Appellant recording her during their sexual encounter on 31 October 2021, (2) that she confronted him and requested to see the video, and (3) that she instructed Appellant to delete the video after she saw her nude buttocks on the recording. (R. at 170-171, 144, 175, 179.) Moreover, the context of Appellant's statements indicate the video TM saw of her nude buttocks was in fact a video of her from their 31 October 2021 encounter. Appellant admits he recorded her that day without her permission and that when TM confronted him, she demanded to see it prior to him deleting it. (R. at 340.) During that point in his interview, he was unequivocally discussing the non-consensually recorded video he took on 31 October 2021. Appellant's admissions indicate he took a video, TM caught him in the act, requested to see it, and after viewing instructed him to delete it. (R. at 340.) Appellant never indicated the video he showed her was a video of someone else or an old video and doing so in the context of the confrontation would have been illogical. He was clear that the confrontation revolved around the video he had just recorded and when TM confronted him, he knew she was referring to the video he had just taken. Having been caught in the act and confronted, the only logical conclusion is that Appellant showed her the video he had just taken and deleted it. Therefore, this Court should be unpersuaded by Appellant's attempts to generate reasonable doubt where his own words prove his claims to be false.

The context of Appellant's statements to OSI also undercuts his argument that the discrepancy over the timestamp on the video creates doubt about what video TM saw. (App. Br. at 10-11.) During her initial interview with OSI, TM indicated the timestamp she saw on the

video showed it had been taken two minutes prior to her seeing it. (R. at 183.) At trial she testified the timestamp was "maybe 12 minutes prior." (R. at 179.) Her testimony indicates she was not certain about the exact timestamp on the video. However, the timestamp was not the only evidence available to the factfinder. Appellant indicated (1) TM caught him recording a video without her permission; (2) TM confronted him in the immediate aftermath of catching him; (3) she asked to see the video he had just recorded; and (4) after seeing it, she instructed him to delete it. (R. at 340.) Based on this context, Appellant's own words establish that when confronted about the video he had just taken, he showed it to TM, and he deleted it at her instruction. The evidence firmly establishes that the video TM saw was the video Appellant had recorded and been confronted about. Therefore, this Court should heed Appellant's own words and find that the uncertainty about the time stamp on the video does not create any doubt when Appellant was clear that the video he showed TM and deleted was the video he had just recorded without her consent.

Appellant raised factual sufficiency but failed to prove that the finding of guilty was against the weight of the evidence. TM's reliable testimony and Appellant's own words show the government proved the first element beyond a reasonable doubt. Appellant made a recording that depicted TM's naked buttocks without her consent. This Court should be clearly convinced that the finding of guilty aligned with the weight of the evidence, and this Court should affirm Appellant's conviction. Appellant's assignment of error should be denied.

B. Appellant did not have an honest belief that TM consented. Even if he had, Appellant such a belief would have been objectively unreasonable.

Appellant alleges the evidence raises the defense of reasonable mistake of fact as to consent, and the government failed to prove beyond a reasonable doubt that the defense did not apply. (App. Br. at 11-12.) Appellant is wrong. For the defense to apply, the mistake must have

both existed in Appellant's mind and been reasonable under all the circumstances. R.C.M. 916(j)(1). The honest belief prong is subjective, while the reasonableness prong is an objective standard. United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011) (citing United States v. Willis, 41 M.J. 435, 438 (C.A.A.F. 1995)). Appellant neither held an honest belief that TM consented to his recording, nor would it have been reasonable for him to have done so.

In support of his claim, Appellant cites a text message he sent to TM stating, "he thought it was ok to record their sexual encounter because he had done the same thing previously." (App. Br. at 12.) Appellant states that at the time he made this statement, he had no indication OSI was involved, and he was not defending himself against criminal allegations. (Id.) This is untrue. Prior to Appellant sending this text message, TM informed him she had filed a police report, that what he had done was a felony, and she was considering whether to press charges. (Pros. Ex. 2 at 4.) Given context, Appellant's assertion of an honest belief as to consent rings hollow.

Moreover, the government introduced extensive evidence that further demonstrates Appellant's statement lacked sincerity. Prior to recording their sexual encounter on 31 October 2021, Appellant neither asked for permission, nor discussed it with TM. On two other occasions, Appellant had asked for explicit permission. The first time he proposed recording, TM declined. (R. at 134-135.) The second time, TM permitted Appellant to record 10 videos but her reaction in the aftermath was telling. (R. at 135, 162.) After seeing one of the videos, she told Appellant she was uncomfortable and repeatedly requested he delete all the videos and only stopped asking when he confirmed that he had. (R. at 136-137.) On 31 October 2021, Appellant was on notice that TM was not comfortable with being recorded.

Appellant's actions belie his claims of an honest belief of consent. When Appellant made the consensual recordings in April, TM was able to see the camera and was fully aware she was being recorded. (R. at 162-163.) On this occasion, Appellant was behind TM where she could not view the camera. When she did turn her head, Appellant quickly hid his phone. (R. at 170-171.) Unlike the consensual recordings, he did not show her the video or mention the video in any way. When TM confronted him and told him to "[d]elete it," Appellant's body froze momentarily, and he began to frantically swipe on his phone screen, behavior consistent with someone who had been caught in the act. (R. at 144, 177.) At that time, Appellant made no claim that he thought it was ok, nor did he attempt to explain his actions.

During his interview with OSI, Appellant volunteered that he had recorded himself and TM without her permission on one occasion. (Pros. Ex. 7 at approx. 00:42:18-00:42:20.) Again, Appellant did not claim that he thought it was ok because of the previous consensual recordings. Appellant's own statements and his actions in the immediate aftermath of being confronted by TM, demonstrate beyond a reasonable doubt that his claimed belief lacked sincerity, and he held no honest belief that TM was consenting.

Given TM's previous reticence and expressed discomfort with recording, no reasonable person would have believed that she would consent to doing so again. At the very least, a reasonable person would have ensured they discussed it first and that her previous unease was resolved prior to recording. Even if Appellant's belief had been sincere, considering all the surrounding circumstances, no reasonable person would have believed TM consented to Appellant recording their sexual encounter on 31 October 2021.

This Court should find the evidence was factually sufficient, because this Court should not be "clearly convinced the finding of guilty was against the weight of the evidence." The

weight of the evidence shows Appellant recorded her nude buttocks without her permission and any mistake of fact Appellant claims to have had was neither sincere, nor reasonable under the circumstances. Since the findings were factually sufficient, this Court should deny this assignment of error.

The military judge correctly found the reasonable mistake of fact as to consent defense was not applicable. The government met its burden to prove (1) Appellant did not hold a sincere belief as to TM's consent, and (2) any belief Appellant may have had was objectively unreasonable given the surrounding facts and circumstances, beyond a reasonable doubt. This Honorable Court should be clearly convinced that the finding of guilt in this case was not against the weight of the evidence and should affirm Appellant's conviction.

II.

THE RECORD OF TRIAL IS INCOMPLETE; THUS REMAND IS APPROPRIATE.

Additional Facts

On 22 September 2022, Appellant filed a motion to admit evidence pursuant to Mil. R. Evid. 412. (App. Ex. III.) The motion contained attachments, three of which were contained on discs. (Id.) The military judge explained that each disc contained two data files. (R. at 52.) In the Record of Trial (ROT), the disc identified as Attachments 1-2 to Appellate Exhibit II contains three video files, and the disc identified as Attachment 4 includes only one file. Appellate Exhibit II and its attachments were sealed by the military judge. (*Certificate of Exclusion of Sealed Materials in Copies of ROT*, dated 16 March 2023, ROT, Vol. 3.) Thus, the ROT docketed with the Court is inconsistent with the military judge's description of Appellate Exhibit II.

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed de novo. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000). Proper completion of post-trial processing is a question of law subject to de novo review. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 22 Jul 2004).

Law and Analysis

A complete record of proceedings must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ. Under United States v. Henry, a substantial omission from the record of trial renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. 53 M.J. 108, 111 (C.A.A.F. 2000). A record of trial must include, among other materials, "[e]xhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits." R.C.M. 1112(b)(6). Courts approach the question of what constitutes a substantial omission on a case-by-case basis. United States v. Abrams, 53 M.J. 361, 363 (C.A.A.F. 1999). In determining whether an omission is substantial, the courts assess whether the omission impacts "an appellant's substantial rights at trial." United States v. Hill, No. ACM 38648, 2015 CCA LEXIS 308, *10 (A.F. Ct. Crim. App. July 29, 2015).

The government acknowledges that attachments to a defense motion to admit evidence under Mil. R. Evid. 412 necessarily implicates "an appellant's rights at trial," given Appellant's assertion that its omission prevents a complete assessment of the performance of trial defense counsel. (App. Br. at 15.) The attachments to Appellate Exhibit II in the ROT do not comport with the military judge;s description of the attachments on the record. Because the file names were never put on the record, it is not possible to verify that the ROT contains all of the digital

files comprising Appellate Exhibit II. Any omitted digital files would constitute a substantial omission that raises a presumption of prejudice, per Henry. A remand would allow government trial counsel and trial defense counsel to verify that the attachments appropriately reflect what was introduced at trial, and would allow them to correct any potential omission.

An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2). Appellant's requested relief is remand for correction of Appellate Exhibit II. (App. Br. at 15.) Therefore, this Court should remand Appellant's case for new post-trial processing.

III.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER MORENO, TARDIF, OR GAY.

Additional Facts

Appellant was sentenced on 14 December 2022. (*Entry of Judgement*, ROT, Vol. 1.) Appellant's case was docketed with this Court on 4 April 2023. Between his sentence and docketing with this Court, 112 days elapsed. After this case was docketed, Appellant requested 11 enlargements of time, and all were opposed by the Government. Appellant submitted his brief on 9 May 2024, after 402 days had elapsed since docketing. (App. Br. at 1). Appellant took at least 402 days before notifying anyone of the discrepancy between Attachments 1, 2, and 4 to App. Ex. II and their respective descriptions on the record discussed in his third assignment of error. (App. Br. at 23). The government requested and received one seven day enlargement of time. From docketing with this Court to the date of this filing, 438 days have elapsed. To date, Appellant has not made a demand for speedy appellate review.

Standard of Review

This Court reviews *de novo* an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

This Court applies an aggregate standard threshold to ensure appellants' due process rights to timely post-trial and appellate review are protected. Livak, 80 M.J. at 633. To avoid unreasonable delay, the entire period from the end of trial to docketing on appeal must be within 150 days. Id. at 633-634. Additionally, in Moreno, the CAAF held that a presumption of unreasonable post-trial delay should be applied when appellate review is not complete, and a decision is not rendered within 18 months of docketing before the Court of Criminal Appeals. *See* Moreno, 63 M.J. at 142. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete and without errors to stop the clock. *See* United States v. Muller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.). Moreover, this Court held so long as a record is docketed within the 150-day Livak standard, an appellant is not entitled to unreasonable post-trial delay when the record is later found to be incomplete. Muller, upub. op. at 16.

When a case does not meet either the 150-day Livak standard or the 18-month Moreno standard, the delay is presumptively unreasonable. *See* Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). When a delay is presumptively unreasonable, courts apply a balancing test to determine whether a due process violation occurred, which includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice, which considers preventing oppressive pretrial incarceration, minimizing anxiety of the accused, and limiting the possibility of an impaired defense. Id. All four

factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would 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). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66, UCMJ, because the statute allows courts "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." 57 M.J. 219, 224 (C.A.A.F. 2002). The existence of a post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Analysis

A. *The Government met the 150-day Livak standard, and the 18-month Moreno standard has not yet been violated, so Appellant is not yet entitled to the presumption of post-trial delay.*

Appellant argues this Court should find that the docketing of an incomplete record does not toll the presumption of unreasonable delay. (App. Br. at 17-21.) But the 150-day Livak standard was met when the case was first docketed 4 April 2023, 112 days after sentencing. 80 M.J. at 633; *See also* United States v. Gammage, No. ACM S32731 (f rev), 2023 CCA LEXIS 528, at *5-6 (A.F. Ct. Crim. App. 15 Dec. 2023) (unpub. op.) (finding original docketing of record with CCA 55 days after sentencing "categorically complied" with 150-day Livak standard for facially unreasonable delay despite subsequent remand due to incomplete record of trial). Complying with the Livak clock does not require the ROT to be without errors, and the ROT here was therefore adequately docketed, and any incompleteness discovered after docketing does not warrant relief. Muller, unpub. op. at *13. Appellant asks this Court to find that docketing of an incomplete ROT "does not toll the

presumption of unreasonable delay." (App. Br. at 19.) This Court has declined to interpret Moreno and Livak in the manner Appellants suggests. *See* United States v. Donley, No. ACM 40350 (f rev), 2024 CCA LEXIS 228, at *36 (A.F. Ct. Crim. App. June 11, 2024) (unpub. op.) (declining to adopt a rule that docketing of an incomplete record of trial "does not toll the presumption of unreasonable delay" in the post-trial processing of a case, because it would be contrary to the plain language of Moreno and Livak).

Moreover, this case is still within the eighteen-month timeframe for appellate review established in Moreno, 63 M.J. at 142. That leaves enough time for the error to be remedied on remand and for this Court to meet its 18-month deadline under Moreno. Any prejudice to Appellant is speculative at this point.

B. *No due process violation has occurred, and Appellant has not been prejudiced by a post-trial delay.*

Even if appellate review exceeds 18 months, there was no due process violation under the Barker factors. As discussed above, the government met the 150-day Livak standard. Livak, 80 M.J. at 633. Even assuming a violation of the 18-month Moreno standard, that does not end the inquiry.

Relevant to the second factor – reasons for the delay – Appellant requested eleven enlargements of time, resulting in 402 days elapsing between Appellant's case being docketed with this Court and the Appellant filing his Assignments of Error. (App. Br. at 1). The Government opposed every request for an enlargement of time. Appellant explicitly consented to 6 of those 11 requests for an enlargement of time. While Appellant asserts the government has caused unreasonable delay, he failed to mention the time attributable to his requests for enlargements of time. (App. Br. at 20). The government requested one seven-day enlargement of time. And as discussed above, while the government agrees the omission necessitates remand,

there is ample time to remedy the error and for this Court to conduct its Article 66, UCMJ review within the 18-month deadline under Moreno. Thus, the second Barker factor favors the government. Id.

The third Barker factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay. Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). Appellant did not assert his right to timely review, has consented to over half of his total enlargements of time to file a brief, and the third factor therefore weighs against him.

The prejudice factor also favors the Government. The Supreme Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in cases of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, 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. Appellant does not allege any particularized or generalized prejudice. (App. Br. at 17-21.) Here, Appellant stated the law and then provided no indication of oppressive incarceration pending appeal, undue anxiety and concern, impairment of a retrial, or any other prejudice. Further detracting from any prejudice argument, Appellant requested eleven enlargements of time to file his appeal, resulting in an additional 402 days of delay from docketing the case with this Court until filing his assignments of error. To the extent that Appellant was "prejudiced" by any delay caused by the erroneous appellate exhibit, he was arguably more prejudiced by his

own delay in filing an appeal. Because no prejudice occurred, the Court then turns to the analysis under Toohey to determine if the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." 63 M.J. at 362. The Court looks at all four Barker factors considering the public perception standard. Id. In Toohey, no prejudice was found, but the length of the delay played largely into the Court's public perception analysis. Id. Approximately 47 months passed between docketing of the appellant's appeal and the Navy-Marine Court of Criminal Appeals making their decision. 63 M.J. at 357. This delay far exceeded Moreno's 18-month threshold for appellate review and negatively affected the public's perception of fairness in the military justice system. 63 M.J. at 358. In contrast, this Court has not even yet exceeded the 18-month threshold set in Moreno. Because no facially unreasonable delay has occurred and any prejudice to Appellant is speculative, a determination about the public's perception of the fairness and integrity of the military justice system is premature.

In summary, the presumption of post-trial delay has not yet been triggered, and Appellant has not experienced any prejudice. Thus, this Court should deny this assignment of error.

C. ***Appellant is not entitled to relief under Tardif.***

Appellant argues that, even if he is not entitled to relief pursuant to Moreno, the delay in this case still entitles him to have this Court either disapprove of his bad conduct discharge under Tardif. (App. Br. at 30). An appellant may be entitled to relief under Tardif even without a showing of actual prejudice "if [the court] deems relief appropriate under the circumstances." 57 M.J. at 224. The existence of post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. However, this authority to grant appropriate relief is "for unreasonable *and* unexplained

post-trial delays." Id. at 220 (emphasis added). Further, relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). The facts and circumstances of this case do not meet any of the non-exhaustive Gay factors. First, the 18-month standard set forth in Moreno has not yet been violated. While the government acknowledges that remand is appropriate to remedy the identified error, there is ample time to remedy the omission and for this Court to conduct its Article 66, UCMJ review before its 18-month deadline under Moreno. There is no evidence that up to this point, there has been any harm to the Appellant or to the institution. Given the lack of any delay violative of the Moreno standards, this Court granting relief would not be consistent with the dual goals of justice and good order and discipline, given the seriousness of the charges of which Appellant was convicted and the absence of

governmental bad faith. Providing sentence relief without a showing of actual prejudice in this case would not be meaningful. If this Court were to grant sentence relief, it would be rewarding Appellant for taking 402 days to file his brief after this case was originally docketed with this Court.

In this case, Appellant has not experienced any prejudice to date, and any future prejudice caused by this Court being unable to render a decision within 18 months is speculative. A remedy is not warranted. A balancing of the six Gay factors weighs in the Government's favor, and no egregious or prejudicial delay yet exists requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error.

IV.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Additional Facts

Appellant was convicted of one specification of Indecent Recording, in violation of Article 120(c), UCMJ. (*Entry of Judgment*, dated 1 February 2023, ROT, Vol. 1.) The maximum punishment for indecent recording is forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge. MCM, pt. IV, ¶ 63(d)(2). The military judge sentenced Appellant to be reduced to the grade of E-1, confinement for two months, and a bad conduct discharge. (*Entry of Judgment*, dated 1 February 2023, ROT, Vol. 1.) The Staff Judge

Advocate's first indorsement to the Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Statement of Trial Results*, dated 14 December 2022, ROT, Vol. 1.)

Law and Analysis

Appellant asserts that 18 U.S.C. § 922 is unconstitutional because the government cannot prove that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation." (App. Br. at 23.) Appellant asserts that any prohibitions on the possession of firearms runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument is without merit. *See, e.g.,* United States v. Denney, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024) (finding no discussion or relief merited for similar arguments by appellant convicted of child pornography distribution) (unpub. op.) (internal citations omitted).[6]

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" Id. at § 922(g)(1). Appellant was convicted of one Charge and one Specification of Indecent Recording, in violation of Article 120(c), UCMJ, a crime punishable by imprisonment for a term exceeding one year.[7] (*See* MCM, pt. IV, ¶ 63(d)(2).)

[6] CAAF has granted review in this case. United States v. Denney, 2024 CAAF LEXIS 197 (C.A.A.F., Mar. 29, 2024).

[7] Persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, also may not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

A. *This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.*

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. *See also* United States v. Vanzant, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024) (concluding that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond this Court's authority to review"). Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br. at 24). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

Appellant bases his argument solely on an asterisk footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has

previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Appellant asks this Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or Entry of Judgment is proper.

Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act "with respect to the findings and sentence as entered into the record. . . ." Article 66(d)(1)(A)); *see generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited jurisdiction, defined entirely by statute).

Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the many times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach the same conclusion here.

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors in the performance of its duties and responsibilities, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, No. 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.), the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force Courts of Criminal Appeal have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corps Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's

jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the Entry of Judgment and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Thus, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The Staff Judge Advocate (SJA) followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for qualifying offenses under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, para. 29.32.

Furthermore, para. 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Para. 29.30.1.1.

Appellant's conviction qualified him for criminal indexing per 18 U.S.C. § 922(g)(1), and the first indorsements to the Entry of Judgment and Statement of Trial Results properly

annotated the prohibition in accordance with DAFI 51-201.[8] Thus, there is no error for this Court to correct.

C. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.

In Bruen, the Supreme Court held the standard for applying the Second Amendment is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command.

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws

[8] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

> forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 22). Even so, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition is in keeping with the United States' historical tradition of firearm regulation. Id. But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit [] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony). He is thus prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The Court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; *accord* Folajtar v. Attorney General of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including non-violent felons—based upon the Second Amendment's history and tradition). Thus, Appellant's conviction for a felony offense places him squarely within the United States' longstanding tradition of firearm prohibitions.

Appellant's conviction for Indecent Recording proves that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. § 922's prohibitions. Appellant is not entitled to relief.

CONCLUSION

WHEREFORE, 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 17 June 2024 via electronic filing.

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