IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 17 March 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 **1 June 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 44 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 17 March 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

20 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

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

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 20 March 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 25 May 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an 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 July 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907; and two charges, each with one specification, of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 23 Nov. 2022. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115, UCMJ,

10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 Nov. 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her 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 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

---

[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

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. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

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

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*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 23 June 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 July 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907; and two charges, each with one specification of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 23 Nov. 2022. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115, UCMJ,

10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 Nov. 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her 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 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

---

[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

CERTIFICATE OF FILING AND SERVICE

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

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

23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 19 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 (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 August 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907; and two charges, each with one specification of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 23 Nov. 2022. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115, UCMJ,

10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 Nov. 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Appellant is not currently confined.

Counsel is currently assigned 20 cases; 12 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Rupp*, ACM S32746 – The record of trial is two volumes consisting of three prosecution exhibits, 11 defense exhibits, 1 court exhibit, and eight appellate exhibits; the transcript is 140 pages. Undersigned counsel has completed her review of the record and is drafting the brief.
2) *United States v. Brown*, ACM S32747 – The record of trial is three volumes consisting of five prosecution exhibits, 12 defense exhibit, and four appellate exhibits; the transcript is 139 pages. Undersigned counsel has not yet begun reviewing the record of trial.

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[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has not yet begun reviewing the record of trial.

Through no fault of Appellant, undersigned counsel has been unable to complete her 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 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 19 July 2023.

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

20 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

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

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 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 *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 23 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 September 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

After Appellant's last motion for an enlargement of time, 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. Additional time is necessary for undersigned counsel to familiarize himself with the case in order to competently advise Appellant. A motion to withdraw from Maj Hawkins is being filed concurrently with this motion.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 23 November 2022 (EOJ). In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform

Code of Military Justice (UCMJ), 10 U.S.C. § 907; and two charges, each with one specification of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; EOJ. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 November 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 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; ten clients are pending initial AOEs before this Court. Four 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

[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

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 exhibits; the transcript is 396 pages. Undersigned counsel has reviewed approximately two-thirds of the record.

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 reviewed more than three-quarters of the record.

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.

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 this enlargement of time, and agrees with this enlargement of time.

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 Appellate Government Division on 23 August 2023.

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

25 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Airman (E-2), **MAKINNON A. MYERS,** United States Air Force, *Appellant.*	)	No. ACM S32749 23 August 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. Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant. Major Frederick Johnson has been detailed substitute counsel in undersigned counsel's stead and made his notice of appearance on 23 August 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
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

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. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 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 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 **29 October 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 23 November 2022 (EOJ). In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and two charges, each with one specification, of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; EOJ. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115,

UCMJ, 10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 November 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 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.[3] Four 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.

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[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

[3] 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

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 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.

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 AOE.

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 has completed his review of the record of trial.

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

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested 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 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. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 20 October 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a 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 **28 November 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 23 November 2022 (EOJ). In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and two charges, each with one specification, of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; EOJ. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115,

UCMJ, 10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 November 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 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.[3] Five 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.

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[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

[3] 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 (except sealed materials) 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.

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

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

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 (except sealed materials, which he has an appointment to view on 23 October 2023).

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.

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 20 October 2023.

Respectfully submitted,

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

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started 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 24 October 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 (EIGHTH)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 21 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 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 December 2023**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 23 November 2022 (EOJ). In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and two charges, each with one specification, of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; EOJ. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115,

UCMJ, 10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 November 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 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.[3] Four matters have priority over this case:

1) *United States v. Gause-Radke*, ACM 40343 – The record of trial is eight volumes consisting of 12 prosecution exhibits, six defense exhibits, 42 appellate exhibits, and four court exhibits; the transcript is 1167 pages. Undersigned counsel has petitioned

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[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

[3] Since the filing of Appellant's last request for an enlargement of time, counsel prepared for and presented oral argument to the U.S. Court of Appeals for the Armed Forces (CAAF) as lead counsel in *U.S. v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF, assisted in the preparation and sat second chair for oral argument in *U.S. v. Jennings*, ACM 40282, participated in practice oral arguments for four additional cases, completed his review of the record of trial and began drafting the AOE in *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

the CAAF to grant review in this case and drafted the supplement to the petition, which must be filed by 28 November 2023.

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

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

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 or trial 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 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 21 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. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant 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 started 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 27 November 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32749**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Makinnon A. MYERS	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

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

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

ORDERED:

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

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

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 21 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 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 **27 January 2024**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

From 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 23 November 2022 (EOJ). In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and two charges, each with one specification, of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; EOJ. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115,

UCMJ, 10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 November 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 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.[3] One matter has 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 or trial and is drafting the AOE in this case.

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[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

[3] 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; continued drafting the AOE in *U.S. v. Taylor*, ACM 40371; and participated in practice oral arguments for three additional cases.

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 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 21 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. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 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 started review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 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 (TENTH)**
v.	)	Before Panel No. 1
Airman (E-2) **MAKINNON A. MYERS,** United States Air Force *Appellant*	)	No. ACM S32749 19 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 a tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of ten days, which will end on **6 February 2024**. The record of trial was docketed with this Court on 1 February 2023. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 370 days will have elapsed.

On 26-28 September 2022, Appellant was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 23 November 2022 (EOJ). In accordance with his plea, the military judge found Appellant guilty of one charge and two specifications of false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and two charges, each with one specification, of wrongful use of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98; EOJ. Contrary to his plea, a panel of officer and enlisted members found Appellant guilty of one charge and one specification of communicating a threat in violation of Article 115,

UCMJ, 10 U.S.C. § 915.[1] R. at 53, 527; EOJ. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 165 days, and a bad conduct discharge.[2] R. at 656; EOJ. The convening authority took no action on the findings or sentence but waived all automatic forfeitures for the benefit of Appellant's dependents. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman Makinnon A. Myers*, dated 9 November 2022.

The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Appellant is not currently confined.

Counsel is currently representing 28 clients; 20 clients are pending initial AOEs before this Court.[3] This case is currently counsel's top priority amongst appellate matters. Counsel has reviewed the entire record of trial and is drafting the AOE. However, Counsel is simultaneously preparing to serve as the Master of Ceremonies for the Judge Advocate General's Corps's 75th Anniversary event on 25 January 2024, two days before the end of the current enlargement of time.

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[1] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527; EOJ. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under Rule for Court-Martial 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606; EOJ.

[2] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656; EOJ. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

[3] 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 this case; and participated in practice oral arguments for two additional cases.

Through no fault of Appellant, undersigned counsel has been unable to complete a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully advise Appellant regarding potential errors and draft the AOE. 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 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 January 2024.

Respectfully submitted,

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Joint Base Andrews NAF, MD 20762-6604

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MAKINNON A. MYERS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32749 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 370 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 over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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 23 January 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. Airman (E-2) **MAKINNON A. MYERS,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM S32749 6 February 2024

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

Assignments of Error

I.

WHETHER AIRMAN MYERS'S CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY AND FACTUALLY SUFFICIENT WHERE HE MADE THE CHARGED STATEMENT FOR THE LEGITIMATE PURPOSE OF RECEIVING MENTAL HEALTH CARE AND THE STATEMENT WAS CONDITIONAL.

II.

WHETHER A BAD-CONUCT DISCHARGE IS INAPPROPRIATELY SEVERE CONSIDERING AIRMAN MYERS'S CIRCUMSTNACES, THE NATURE AND SERIOUSNESS OF THE OFFENSES, AND MITIGATING CONTEXT.

Statement of the Case

From 26-28 September 2022, Airman (Amn) Makinnon A. Myers, Appellant, was tried by a special court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. Entry of Judgment (EOJ), 23 November 2022. In accordance with his pleas, the military judge found Amn Myers guilty of two specifications of making false official statements in violation of Article 107, Uniform Code of

Military Justice (UCMJ),[1] 10 U.S.C. § 907, and two specifications of wrongful use of Delta-9 tetrahydrocannabinol (THC) in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. R. at 53, 98. Contrary to his plea, a panel of officer and enlisted members found him guilty of one charge and one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915.[2] R. at 53, 527. The military judge sentenced him to reduction to the grade of E-1, confinement for 165 days, and a bad-conduct discharge.[3] R. at 655–56. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 9 November 2022.

Statement of Facts

On 13 July 2022, Amn Myers, an aircraft maintainer stationed at Joint Base Pearl Harbor-Hickam, Hawaii, faced a mental health crisis. R. at 57, 343. He had previously been treated at the mental health clinic and was on its high-interest list, and he found himself on the phone with that clinic again. R. at 343, 347, 379. What the professionals at the mental health clinic heard from Amn Myers concerned them so much that they instructed him to remain on the phone until someone else was with him. R. at 231, 343. A group of leaders from his unit, who had originally been asked to go to his house to retrieve a medication from him, were soon asked to escort him to the mental health clinic. R. at 228, 232. MSgt A.D. and TSgt J.L. picked up Amn Myers from his residence and drove him to the mental health clinic, arriving at approximately 1500 hours. R. at

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

[2] The members acquitted Appellant of one additional charge and specification of communicating a threat. R. at 527.

[3] The military judge adjudged 90 days of confinement for the specification of Charge I, 15 days of confinement for Specification 1 of Charge II, 30 days of confinement for Specification 2 of Charge II, 10 days of confinement for the specification of Charge III, and 20 days of confinement for the specification of the Additional Charge, with all sentences to confinement running consecutively. R. at 656. Appellant was credited with 75 days of pretrial confinement credit. *Id.*

232. While on the way to the clinic, MSgt A.D. identified himself to the mental health professionals on the phone and took control of the situation, allowing Amn Myers to hang up the phone. R. at 246–47.

After arriving at the mental health clinic, Amn Myers seemed irritated and was visibly shaking. R. at 233. He completed some intake paperwork that included two diagnostic tests: the PHQ-9, which measures depression, and the GAD-7, which measures anxiety. R. at 379; Pros. Ex. 1. Amn Myers's results for both measures were classified as "severe." R. at 348; Pros. Ex. 2 at 2. A mental health technician, A1C A.A., saw Amn Myers wrote that he wanted to harm people in his leadership due to frustration with his pending discharge, and she had him empty his pockets to ensure he did not have any weapons before speaking with him. R. at 324, 326. Amn Myers confirmed what he had written on the intake paperwork, and A1C A.A. informed the on-call provider, Maj C.H., about Amn Myers. R. at 327–28. Maj C.H. then met with him, describing his demeanor as irritated. R. at 368–69. Amn Myers stated that he was upset, having a hard time sleeping, and had thoughts of wanting to hurt other people. R. at 369. He specifically indicated his thoughts about harming others had changed from passive thoughts to active desires, but he also said he had not acted on those desires because he recognized the people he wanted to harm had families, like he did. R. at 369–70. After this initial interaction, Amn Myers asked to speak with Maj C.H. again and told her that he did not want to wait with someone in the waiting room—likely MSgt T.W., his first sergeant who had arrived separately—because he was having thoughts about harming him. R. at 237, 295, 371, 380–81. Ultimately, Maj C.H. determined that Amn Myers needed to be hospitalized, a last resort, because he indicated he felt that he could not leave and be safe. R. at 389–91. Amn Myers volunteered to go to the hospital, even though he knew it could prolong his discharge, because he wanted to be safe for his family. R. at 378; Pros. Ex. 2 at 1.

Emergency medical technicians transported Amn Myers to Tripler Army Medical Center, a nearby hospital, by ambulance. R. at 349. At the hospital, Amn Myers waited with MSgt A.D. and TSgt J.L. in a separate, private waiting room for mental health patients. R. at 249. Amn Myers allowed MSgt A.D. and TSgt J.L. to remain in the room with him while medical personnel went in and out, performing routine procedures like checking Amn Myers's vitals and drawing his blood. R. at 250. At one point, a medical technician came to the room, and Amn Myers relayed his mental health history, including diagnoses and treatments. R. at 251. MSgt A.D. and TSgt J.L. overheard the technician ask Amn Myers general questions to the effect of "how are you doing" or "how are you feeling." R. at 236, 296. MSgt A.D. then overheard Amn Myers say, "[I]f he had to wait one more time, that he was going to cut out the commander's or the flight chief's tongue and staple it to their chests." R. at 236. TSgt J.L. overheard this as well, testifying that Amn Myers said he had homicidal rage, he would be escorted in the back of a squad car if he went to work the next day, and "if I hurry up and wait one more time, I'm going to staple his chest . . . I'm going to cut out his tongue and staple it to his chest." R. 296–97. MSgt A.D. did not react to this statement at the time because he believed they were in the proper place to get Amn Myers help, and the medical technician did not seem to react either. R. at 237, 252.

After the medical technician left, a psychologist came and spoke to Amn Myers behind closed doors. R. at 238, 297. As they came out of the room after this interaction, MSgt A.D. and TSgt J.L. observed that Amn Myers was agitated and sad. R. at 238–39, 297. The psychologist was calmly and professionally telling Amn Myers that he was going to stay at the hospital for the night, while Amn Myers was saying he did not want to stay and would not stay. R. at 239, 297. The psychologist left, and Amn Myers started crying. R. at 239, 298. At this point, he had the opportunity to call his wife, and MSgt A.D. overheard some of Amn Myers's side of the

conversation. R. at 240. Specifically, MSgt A.D. testified he heard Amn Myers say he "wasn't strong enough to either do this or handle this." *Id.* MSgt A.D. also recalled a conversation with Amn Myers in which Amn Myers mentioned something about Reddit, a website on which users discuss a variety of topics, and that he had read something there about actions that could help expedite the separation process. R. at 241, 265, 269. However, MSgt A.D. also acknowledged that he did not remember much about this discussion. R. at 254–55. TSgt J.L. did not hear any statements about Reddit. R. at 396. Eventually, Amn Myers moved to the ward where he would stay, and MSgt A.D. and TSgt J.L. left the hospital. R. at 242.

Amn Myers was released from the hospital, and on 15 July 2022, his commander ordered him into pretrial confinement, where he remained until trial, 75 days later. App. Ex. XI, 3; R. at 500–01. The Government charged Amn Myers with communicating a threat for the statement made to the medical technician at Tripler Army Medical Center as well as for an alleged additional statement. DD Form 458, *Charge Sheet*. At trial, the members found Amn Myers guilty of communicating a threat for the statement to the technician but acquitted him for the additional statement. R. at 527. After the members announced their findings, the defense moved for a finding of not guilty to this charge and specification under R.C.M. 917. R. at 535. After hearing arguments from counsel, the military judge found Appellant guilty of the specification by exceptions. R. at 606.

Amn Myers also pleaded guilty, without the benefit of a plea agreement, to charges and specifications for making false official statements and using THC. R. at 53, 93, 98. For the two specifications of false official statements, Amn Myers acknowledged falsely telling his leadership that mental health extended his quarters and, on another occasion, sending them a DD Form 689, Individual Sick Slip, and falsely telling them that he had received new quarters. R. at 59–60,

67–69. Amn Myers also admitted consuming gummies that contained THC on at least two occasions during the timeframe charged in the specification for using THC on divers occasions. R. at 78–79. He further acknowledged consuming a THC gummy on at least one other occasion during a different timeframe charged in the second specification. R. 87–88.

Argument

I.

The conviction for communicating a threat is legally and factually insufficient because Airman Myers made the charged statement to a medical professional while seeking mental health care and the statement was conditional.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. Art. 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

1. Amn Myers's statement was not wrongful because he made it for the legitimate purpose of seeking mental health care.

A threat is not wrongful, and therefore not a violation of Article 115, UCMJ, 10 U.S.C. § 915, if it is made for a "legitimate purpose that contradicts the expressed intent to commit the act." MCM, Part IV, ¶ 53(c)(2); *see also* R. at 455. One such legitimate purpose is communicating one's state of mind to receive mental health care. *United States v. Cotton*, 40 M.J. 93 (C.M.A. 1994), *but cf. United States v. Greig*, 44 M.J. 356 (C.A.A.F. 1996) (affirming conviction for communicating a threat where accused testified during guilty plea inquiry that he made threats to prevent his release from the hospital). In *Cotton*, the Court of Military Appeals set aside a

conviction for communicating a threat[4] where the appellant told an on-call social worker in the emergency room that he would kill his first sergeant with no problem. 40 M.J. at 94. The court held this statement did not constitute communicating a threat as a matter of law. *Id.* Noting the appellant "went to the base mental health clinic in great distress, looking for help," and "made the utterance to a health professional while describing the cause of his distress," the court concluded, "[I]t is clear that appellant was describing his state of mind." *Id.* at 95. Similarly here, Amn Myers went to the base mental health clinic, and ultimately the hospital, in distress and seeking help. *E.g.*, R. at 252, 343. He made the charged statement to a medical technician in response to questions about how he was doing and feeling. R. at 236, 296. Amn Myers was, like the appellant in *Cotton*, describing his state of mind to seek mental health care, and his statement does not constitute communicating a threat as matter of law. 40 M.J. at 94.

Service courts of criminal appeals have reached similar holdings concerning statements made to mental health care providers. *United States v. Wright*, 65 M.J. 703 (N-M Ct. Crim App. 2007); *United States v. Gean*, 71 M.J. 553 (A. Ct. Crim. App. 2012). In *Wright*, the Navy-Marine Corps Court of Criminal Appeals found a guilty plea improvident where the appellant pleaded guilty to communicating a threat after he told a mental health provider that, once reunited with members of his command on an upcoming deployment, he believed he would injure them by "beating them to a pulp with his E-tool shovel." 65 M.J. at 704. The court focused on the context of the statement, concluding the appellant communicated his current mental state to a health care provider for the purpose of obtaining evaluation and treatment. *Id.* at 705. Thus, the court held,

[4] Although communicating a threat was charged under Article 134, UCMJ, 10 U.S.C. § 934, in *Cotton* and other cases cited herein, the elements for communicating a threat were the same under Article 134 as they are in the instant case under Article 115, except for the terminal element of Article 134, which does not apply to Article 115. *See Cotton*, 40 M.J. at 94–95.

"[T]hreatening statements (1) uttered in the context of an exchange of information with medical personnel, (2) which express the declarant's current mental state or distress, and (3) which are uttered for the purpose of obtaining medical evaluation and treatment are not wrongful and do not constitute communicating a threat." *Id.* Here, Amn Myers's statement meets all of the conditions identified by that court: the statement came in the context of an exchange of information with the medical technician at Tripler Army Medical Center, it expressed his current mental state and distress in response to questions about how he was feeling, and it was uttered for the purpose of obtaining medical evaluation and treatment, which the witnesses to the statement agreed was the reason he was at the hospital. R. at 236, 256, 296–97, 305–06. Consequently, Amn Myers's statement, like the appellant's statement in *Wright*, is not wrongful and does not constitute communicating a threat. 65 M.J. at 705.

Similarly, the Army Court of Criminal Appeals in *Gean* found the evidence both legally and factually insufficient to support convictions for communicating a threat.[5] 71 M.J. at 554. The appellant in *Gean* told a psychiatrist that he would break a sergeant's legs, cut another sergeant's mouth open, and break a specialist's jaw. *Id.* The facts of *Gean* are distinct from the instant case in that the appellant's command in *Gean* directed the psychiatric evaluation that led to the charged statements, *id.*, while Amn Myers's evaluation was not directed by his command, but this distinction does not make a difference when considering this case. The court in *Gean* repeatedly indicated the charged statements were compelled by both command direction and psychiatric need. *Id.* at 554–55. Amn Myers was in distress, and his psychiatric need to communicate his current mental state to the medical technician compelled his statement. Moreover, there is no indication

[5] When ruling on the Defense's motion under R.C.M. 917, the military judge explicitly considered *Gean*, but there is no indication in the record that he was aware of *Cotton* or *Wright*. R. at 604–05.

the appellants in either *Cotton* or *Wright* received mental health care at command direction, but the courts in both cases still held the threatening statements they made to mental health providers were not wrongful. 40 M.J. at 94–95; 65 M.J. at 705. Reading these cases together, it is clear that whether a mental health evaluation was command-directed is not dispositive. The key is the psychiatric need to openly communicate one's mental status to a mental health care provider. Amn Myers had that need, and he made the charged statement to communicate his mental condition when asked by a mental health provider. Thus, this court should conclude, as did the court in *Gean*, that the evidence is legally and factually insufficient to support the conviction for communicating a threat. 71 M.J. at 554.

Once evidence raised the issue of a legitimate purpose for making a charged statement, the government had the burden to disprove that legitimate purpose beyond a reasonable doubt. R. at 455. The context of Amn Myers's statement raised the issue that he made the charged statement for the legitimate purpose of receiving mental health treatment, putting the burden on the government to disprove this beyond a reasonable doubt. *Id.* The Government did not meet this burden. Trial counsel argued that MSgt A.D.'s testimony about Amn Myers's Reddit comment meant Amn Myers actually made the charged statement to try to get his separation processed faster. R. at 241, 265, 469–70. Extensive evidence contradicts this argument. Amn Myers received mental health care in the past to such an extent that he was on the mental health clinic's high-interest list, so it is not surprising he sought such care again on 13 July 2022. R. at 343, 347, 379. The facts from that day all indicate a true mental-health emergency: the results of diagnostic tests Amn Myers took for depression and anxiety were both classified as severe; all of the mental health professionals with whom Amn Myers spoke treated his descriptions of his mental status seriously by, for example, checking to see if he had any weapons and transporting him by

ambulance; and Maj C.H. did what she described as a last resort by hospitalizing Amn Myers. R. at 326, 349, 389–91; Pros. Ex. 2 at 2. Most importantly, Amn Myers's medical records state that he went to the hospital voluntarily even though he was aware this could prolong his discharge time. Pros. Ex. 2 at 1. If this was all a ruse to expedite his separation, as the Government previously argued, it would make no sense for Amn Myers to voluntarily go to the hospital once he knew that would have the opposite effect. *See* R. at 469–70.

The Government cannot overcome all of this evidence by pointing to a vague statement recalled by a witness who acknowledged he did not remember much about the discussion. R. at 254–55. This situation is also distinguishable from that in *Greig*, where the appellant admitted during the guilty plea inquiry that he made the charged statement for an improper purpose. 44 M.J. at 357–58. Amn Myers's statement, which was unclear and recalled by a witness with an admittedly poor memory of the conversation, is far less compelling than statements made under oath during a guilty plea inquiry. Moreover, Amn Myers could have hoped to expedite his separation by honestly seeking mental health care for his troubled mental state. A desire to expedite separation from the military does not vitiate the validity of efforts to obtain needed mental health care. This possibility furthers the reasonable doubt that Amn Myers's statement was wrongful. In light of this evidence, the Government did not meet its burden of disproving, beyond a reasonable doubt, that Amn Myers made the charged statement for the legitimate purpose of receiving mental health treatment.

This Court "may affirm only such findings of guilty . . . as the Court finds correct in law." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States*

v. Robinson, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). Here, the fact that Amn Myers made the charged statement to a mental health provider for the purpose of receiving treatment makes the conviction legally insufficient. That the charged communication was wrongful is an essential element of Article 115, UCMJ, MCM, Part IV, ¶ 53(b)(1)(c), and no rational trier of fact could have found this element beyond a reasonable doubt in light of the evidence. Amn Myers's continual efforts throughout the day to seek mental health treatment, even to the detriment of his separation timeline, combined with the actions of the professionals with whom he interacted show that his statement was one part of a legitimate effort to seek care. As the courts held in *Cotton*, *Wright*, and *Gean*, a statement made to communicate one's mental state to a mental-health provider when seeking care is not wrongful. 40 M.J. at 94; 65 M.J. at 705; 71 M.J. at 554. The evidence creates reasonable doubt which is not overcome by any other evidence. Under these circumstances, a rational trier of fact could not have found the statement was wrongful beyond a reasonable doubt, so the conviction is legally insufficient.

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." Art. 66(d)(1)(B)(i), UCMJ; 10 U.S.C. § 866(d)(1)(B)(i) (2021). 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." Art. 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. §

866(d)(1)(B)(iii) (2021). Amn Myers requests this Court consider whether the finding of guilt for communicating a threat is correct in fact and find the proof is deficient because the government failed to meet its burden of proving, beyond a reasonable doubt, that the charged statement was wrongful. Since the evidence shows Amn Myers made the charged statement to describe his mental status in response to a medical technician's question, and that this was one part of an overall effort to obtain mental health care, this Court should not be convinced of Amn Myers's guilt beyond a reasonable doubt. Therefore, the conviction for communicating a threat is also factually insufficient.

2. Amn Myers's statement was conditional, meaning it did not express a present intent to harm another.

The conviction for communicating a threat is also legally and factually insufficient because the charged statement was conditional. The court in *Cotton*, in addition to finding that the appellant was describing his state of mind to a health professional, parsed the language of the charged statement and concluded it was conditional. 40 M.J. at 95. In that case, the appellant was charged with communicating a threat to harm his first sergeant by saying, "Senior Master Sergeant Bankey, I'd kill with no problem." *Id.* at 94. The court noted that "I'd" is a contraction for "I would" or "I should," so the literal meaning of the appellant's statement was what he would or should do "based on an unknown or unexpressed condition." *Id.* at 95. This statement, the court held, expressed "a condition antithetical to a present determination to harm another," and the conviction for communicating a threat was therefore in error. *Id.* This holding is consistent with Supreme Court precedent in which the Court noted "the expressly conditional nature of the statement," alongside the reaction of the listeners and other context, when reversing a conviction for threatening the President. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

Like the statement in *Cotton*, Amn Myers's statement was conditional. Both witnesses

who recounted the charged statement testified that it included conditional language, with MSgt A.D. testifying Amn Myers used words to the effect of "if he had to wait one more time," while TSgt J.L. recalled the language "if I hurry up and wait one more time." R. at 236, 296–97. Both versions indicate an antecedent condition to the threatening language, and although there is some more detail to this condition than the unknown condition in *Cotton*, it is still not clear exactly when, if ever, Amn Myers would actually do as he stated. 40 M.J. at 95. As in *Cotton*, this statement expressed "a condition antithetical to a present determination to harm another." *Id.* Since communicating language expressing a present determination or intent to injure another is an essential element of Article 115, UCMJ, MCM, Part IV, ¶ 53(b)(1)(a), no rational trier of fact could have found the essential elements for communicating a threat in light of the conditional nature of the statement. This is also another deficiency of proof which should leave this Court unconvinced of Amn Myers's guilt beyond a reasonable doubt. Especially when considering the conditional nature of the statement alongside the mental health care context in which it was made, as was the case in *Cotton*, the conviction for communicating a threat is legally and factually insufficient. 40 M.J. at 95.

3. The Court should reassess Amn Myers's sentence to not include the 90 days of confinement adjudged for communicating a threat or a bad-conduct discharge.

If the Court sets aside the findings of guilt for Charge I and its Specification, it should also reassess the sentence. This Court has broad discretion to determine whether to reassess a sentence and to decide upon a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). *Winckelmann* provides four illustrative, but not dispositive, factors to consider when determining whether to reassess a sentence:

(1) Dramatic changes in the penalty landscape and exposure.

> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 15–16 (citations omitted). An analysis of the factors here weighs in favor of sentence reassessment. Without the conviction for communicating a threat, the maximum penalty remains the forum maximum for a special court-martial, so there is no change in the penalty landscape and exposure. R.C.M. 201(f)(2)(B). Amn Myers chose sentencing by military judge alone, and the Court is more likely to be certain of what a judge would have done. R. at 530. The nature of the remaining offenses does not necessarily capture the gravamen of the original offenses, as the false official statements and use of THC to which Amn Myers pleaded guilty are notably different in nature than the communicating a threat offense. Further, without the communicating a threat offense, most of the facts and circumstances surrounding Amn Myers's statements and actions at the mental health clinic and Tripler Army Medical Center on 13 July 2022 would not have been admissible or relevant to the remaining offenses, which took place at different times.[6] *See* DD Form 458, *Charge Sheet*. This weighs against sentence reassessment and in favor of a sentence rehearing. However, the remaining offenses are also relatively common offenses with which this

[6] One of the false official statement specifications did occur on or about 13 July 2022, the same day as the events leading to the communicating a threat charge, but there is no evidence in the record indicating the false official statement occurred while Amn Myers was at the Mental health Clinic or Tripler Army Medical Center with MSgt A.D. and TSgt J.L. *See* R. at 67–75.

Court should have the experience and familiarity to reliably determine what sentence would have been imposed. Overall, the *Winckelmann* factors weigh in favor of this Court reassessing the sentence.

When reassessing a sentence, the Court must be convinced that, without the error, the sentence would have been at least of a certain magnitude. *Winckelmann*, 73 M.J. at 15 (quoting *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). A reassessed sentence must not be "greater than that which would have been imposed if the prejudicial error had not been committed." *Sales*, 22 M.J. at 308. Here, the prejudicial error is the conviction for communicating a threat. Part of reassessing the sentence without this conviction is simple because the sentences to confinement are segmented. R. at 656. It stands to reason that without the conviction for communicating a threat, Amn Myers would not have been sentenced to the 90 days of confinement he received specifically for that offense. *Id.* Thus, this sentence is greater than that which would have been imposed without the error, and the Court should reassess the sentence of confinement to 75 days, which was the confinement adjudged for the remaining offenses. R. at 656.

The court should also not include a bad-conduct discharge in its reassessed sentence. The segmented sentences to confinement demonstrate that the military judge considered the communicating a threat offense to be the most serious by far. The 90 days of confinement Amn Myers received for this one offense are more than he received for all of the other offenses combined. R. at 656. Setting aside the offense that the military judge considered more serious than all of the others combined should also result in eliminating the bad-conduct discharge, the most serious component of the sentence. *See United States v. Davis*, No. ACM 38359, 2014 CCA LEXIS 402, at *9 (A.F. Ct. Crim. App. July 18, 2014) (unpub. op.) (noting that confinement for less than a year is less severe than a bad-conduct discharge). It is also notable that the confinement

Amn Myers received for all of the other offenses totaled 75 days, the exact amount of time Amn Myers received for pretrial confinement credit. R. at 500–01, 656. This is hardly a coincidence, as the military judge knew the amount of pretrial confinement credit before closing the court to deliberate on a sentence. R. at 500–01, 652. This means all the time Amn Myers served in confinement after trial was aimed directly at the communicating a threat offense, further underscoring the seriousness with which the military judge viewed this offense when determining the sentence. The remaining offenses, use of THC gummies and false official statements regarding restriction to quarters, are not of such a serious nature as to warrant a bad-conduct discharge, a severe punishment that results in an enduring stigma affecting Amn Myers's future "legal rights, economic opportunities, and social acceptability." *United States v. Rasnick*, 58 M.J. 9, 10 (C.A.A.F. 2003). Divorced from the communicating a threat charge, these offenses may not have merited anything beyond nonjudicial punishment or a summary court-martial, where a punitive discharge would not have been possible. It is also important to remember that Amn Myers accepted responsibility for these other offenses by pleading guilty without the benefit of a plea agreement, and an appropriate sentence must reflect this acceptance of responsibility. R. at 53, 93, 98. Considering all of these circumstances, this Court cannot be convinced that, without the erroneous conviction for communicating a threat, the sentence would have at least included a bad-conduct discharge. *Winckelmann*, 73 M.J. at 15. Thus, the Court should not include a bad-conduct discharge in its reassessed sentence.

WHEREFORE, Amn Myers respectfully requests this Honorable Court set aside the findings of guilty as to Charge I and its Specification, dismiss Charge I and its Specification, and reassess the sentence to reduction to the grade of E-1 and confinement for 75 days.

II.

A bad-conduct discharge is inappropriately severe considering Airman Myers's circumstances, the nature and seriousness of the offenses, and the mitigating context, and the other sentence components adequately address the seriousness of the offenses.

Standard of Review

This Court reviews sentence appropriateness de novo. *See United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

Even if this Court does not set aside the conviction for communicating a threat, it should still assess sentence appropriateness and set aside the bad-conduct discharge. This Court may only approve "the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "It follows that a sentence should be approved only to the extent it is found appropriate based on a CCA's review of the entire record." *United States v. Varone*, No. ACM S32685, 2022 CCA LEXIS 426, at *7 (A.F. Ct. Crim. App. July 21, 2022) (unpub. op). In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009).

It is clear from the record that Amn Myers has struggled with his mental health, both within and beyond the charged timeframes, and it is not a stretch to think these struggles affected his conduct. *See* R. at 379; Pros. Ex. 2 (noting Amn Myers was previously prescribed medications and was on the high-interest list for the mental health clinic). Nevertheless, his circumstances do not warrant the permanent stigma of a bad-conduct discharge. *See* R. at 369–70; Pros. Ex. 2 at 1.

The offenses for which he was convicted, even including communicating a threat, are also not especially serious and do not demand a bad-conduct discharge. The mental health circumstances in which Amn Myers made the charged statement are mitigating, and the other offenses are of a relatively minor nature that generally do not warrant a bad-conduct discharge. As a result of the sentence to serve his confinement consecutively, Amn Myers already completed a sentence to 165 days in confinement, a hefty sentence for conduct of this nature which appropriately addressed the seriousness of the offenses, ensured his rehabilitation, and promoted adequate deterrence. R.C.M. 1002(f). It is neither necessary nor appropriate to include a bad-conduct discharge on top of the confinement in this case. After considering all matters contained in the record of trial, this Court should not approve the bad-conduct discharge.

WHEREFORE, Amn Myers respectfully requests that this Honorable Court not approve the bad-conduct discharge.

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 6 February 2024.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) **MAKINNON A. MYERS,** United States Air Force, *Appellant*.	**APPELLANT'S MOTION TO AMEND PLEADING** Before Panel No. 1 No. ACM S32749 9 February 2024

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

COMES NOW the Appellant, Airman (Amn) Makinnon A. Myers, by and through counsel, pursuant to Rule 23.3(n) of this Honorable Court's Rules of Practice and Procedure, and respectfully moves to amend the Brief on Behalf of Appellant.

Three days ago, on 6 February 2024, Amn Myers filed his Assignments of Error in the Brief on Behalf of Appellant. In a footnote addressing cases considered by the military judge when ruling on a motion under Rule for Courts-Martial (R.C.M.) 917, the brief incorrectly stated, "[T]here is no indication in the record that [the military judge] was aware of *Cotton* or *Wright*." Brief on Behalf of Appellant, 8 n.5. The cases referenced are *United States v. Cotton*, 40 M.J. 93 (C.M.A. 1994), and *United States v. Wright*, 65 M.J. 703 (N-M. Ct. Crim. App. 2007). This was an error, as the record shows the military judge noted *Cotton* in an earlier session when considering a proposed variance instruction. R. at 421–29. The military judge did not discuss either case when ruling on the R.C.M. 917 motion, R. at 604–05, and there is no indication on the record that he was aware of *Wright*. This footnote will be accurate if it is amended to read as follows: "[5] When ruling on the Defense's motion under R.C.M. 917, the military judge explicitly

considered *Gean*, but he did not indicate he considered either *Cotton* or *Wright* when ruling on this matter. R. at 604–05."

A proposed corrected copy of page 8 of the brief is attached as an appendix to this motion. Amending footnote 5 as requested will only result in changes to page 8.

WHEREFORE, Amn Myers respectfully requests that this Honorable Court grant this motion and accept the amended version of page 8 of the Brief on Behalf of Appeallant.

Respectfully submitted,

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

APPENDIX

"[T]hreatening statements (1) uttered in the context of an exchange of information with medical personnel, (2) which express the declarant's current mental state or distress, and (3) which are uttered for the purpose of obtaining medical evaluation and treatment are not wrongful and do not constitute communicating a threat." *Id.* Here, Amn Myers's statement meets all of the conditions identified by that court: the statement came in the context of an exchange of information with the medical technician at Tripler Army Medical Center, it expressed his current mental state and distress in response to questions about how he was feeling, and it was uttered for the purpose of obtaining medical evaluation and treatment, which the witnesses to the statement agreed was the reason he was at the hospital. R. at 236, 256, 296–97, 305–06. Consequently, Amn Myers's statement, like the appellant's statement in *Wright*, is not wrongful and does not constitute communicating a threat. 65 M.J. at 705.

Similarly, the Army Court of Criminal Appeals in *Gean* found the evidence both legally and factually insufficient to support convictions for communicating a threat.[5] 71 M.J. at 554. The appellant in *Gean* told a psychiatrist that he would break a sergeant's legs, cut another sergeant's mouth open, and break a specialist's jaw. *Id.* The facts of *Gean* are distinct from the instant case in that the appellant's command in *Gean* directed the psychiatric evaluation that led to the charged statements, *id.*, while Amn Myers's evaluation was not directed by his command, but this distinction does not make a difference when considering this case. The court in *Gean* repeatedly indicated the charged statements were compelled by both command direction and psychiatric need. *Id.* at 554–55. Amn Myers was in distress, and his psychiatric need to communicate his current mental state to the medical technician compelled his statement. Moreover, there is no indication

[5] When ruling on the Defense's motion under R.C.M. 917, the military judge explicitly considered *Gean*, but he did not indicate he considered either *Cotton* or *Wright* when ruling on this matter. R. at 604–05.

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 February 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32749**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Makinnon A. MYERS	)	**PANEL CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 21st day of February, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

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

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
BREEN, DANIEL J., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERRORS
v.	)	Before a Special Panel
Airman (E-2) **MAKINNON A. MYERS** United States Air Force *Appellant.*	)	No. ACM S32794
	)	7 March 2024

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

ISSUES PRESENTED

I.

WHETHER AIRMAN MYERS'S CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY AND FACTUALLY SUFFICIENT WHERE HE MADE THE CHARGED STATEMENT FOR THE LEGITIMATE PURPOSE OF RECEIVING MENTAL HEALTH CARE AND THE STATEMENT WAS CONDITIONAL.

II.

WHETHER A BAD-[CONDUCT] DISCHARGE IS INAPPROPRIATELY SEVERE CONSIDERING AIRMAN MYERS'S [CIRCUMSTANCES], THE NATURE AND SERIOUSNESS OF THE OFFENSES, AND MITIGATING CONTEXT.

STATEMENT OF CASE

Appellant entered mixed pleas at a special court-martial. (*Entry of Judgment*, dated 23 November 2022, ROT, Vol. 1.) Appellant pleaded guilty to two specifications of making a false official statement in violation of Article 117, UCMJ, one specification of using Delta-9-Tretahydocannabinol (Delta-9) once, in violation of Article 112a, UCMJ, and one specification

of using Delta-9 on divers occasions, in violation of Article 112a, UCMJ. (*Entry of Judgment*, dated 23 November 2022, ROT, Vol. 1; R. at 53). Appellant did so without a plea agreement. (R. At 93).

In accordance with his pleas, the military judge found Appellant guilty of two specifications of false official statement in violation of Article 107, UCMJ, and two specifications of using Delta-9-Tretahydocannabinol in violation of Article 112a, UCMJ. (*Entry of Judgment*, ROT, Vol. 1.) Contrary to his pleas, a special court-martial of enlisted and officer members found Appellant guilty of communicating a threat, in violation of Article 115, UCMJ. (*Entry of Judgment*, ROT, Vol. 1; R. at 527). Appellant was ultimately convicted of the following:

> Did at or near Tripler Army Medical Center on or about 13 July 2022, wrongfully communicate to an [sic] nurse, and Master Sergeant [AD] a threat to injure [JS] and [MD], by cutting out their tongue and stapling it to their chest, or words to that effect.

(*Entry of Judgment*, ROT, Vol. 1).

STATEMENT OF FACTS

Communicating a Threat (Specification, Charge I)

Appellant's first sergeant, MSgt TW, was notified that Appellant needed to be escorted to the local mental health facility at Hickam Air Force Base (AFB)[1], Hawaii. (R. at 225, 231, 232). MSgt TW (Appellant's first sergeant), MSgt AD (Appellant's section chief), and TSgt JL (Appellant's supervisor) picked Appellant up from his house and drove him to Hickam AFB's mental health facility. (R. at 225, 232, 294). In the medical notes of Appellant's initial

[1] Hickam Air Force Base, Hawaii, is now known as Joint Base Pearl Harbor-Hickam, but throughout the record witnesses referenced the installation as Hickam Air Force Base.

evaluation, the technician wrote, "[patient] continued to share he 'no longer' has control of his thoughts of wanting to harm his chain of command." (Pros. Ex 2 at 2). "[Patient] feels as though his thoughts of wanting to harm his leadership is his 'will' and him acting on his plan of hurting his leadership is something he has to do." (Pros. Ex 2 at 2).

MSgt TW (Appellant's first sergeant) was in the mental health clinic waiting area while Appellant was evaluated by his mental health provider, Maj CH. (R. at 295). Appellant returned from his evaluation with Maj CH, and after a few minutes he asked to see Maj CH again. (Id.) He explained to her that he could not be in the waiting room because MSgt TW (Appellant's first sergeant) was there, and he wanted to hurt him. (R. at 371). MSgt TW was moved to a different location by Maj CH. (R. at 295, 371). Appellant was extremely irritated after his initial evaluation. (R. at 294-295). Then Appellant was transported to the emergency room at Tripler Army Medical Hospital via ambulance. (R. at 235).

The emergency room mental health technician asked Appellant general questions such as "how are you doing" or "how are you feeling." (R. at 236). MSgt AD (Appellant's section chief) was sitting in the room about four to five feet from Appellant when he heard Appellant respond in a normal tone, "if he had to wait one more time, that he was going to cut out the commander's or the flight chief's tongue and staple it to their chests." (R. at 236, 237). JS was Appellant's commander. (R. at 225). MD was Appellant's flight chief. (R. at 226).

According to TSgt JL (Appellant's supervisor), who was also in the room with MSgt AD (Appellant's section chief), Appellant told the mental health technician:

> I have homicidal rage; if I go into work tomorrow, I'm going to be escorted in the back of a squad vehicle; and, if I hurry up and wait one more time, I'm going to staple his chest . . . I'm going to cut out his tongue and staple it to his chest.

(R. at 296-297). Unlike MSgt AD, TSgt JL was unsure to whom Appellant was referring. (R. at 297).

Appellant's first sergeant (MSgt TW) and flight chief (MD – the subject of one of the threats) were waiting in the parking lot of the Tripler emergency room. (R. at 296). TSgt JL (Appellant's supervisor) described Appellant as "irritable" and "[h]e just seemed tired of waiting." (R. at 296). At one point Appellant was so tired of waiting, he wanted to walk out of the emergency room and hospital security blocked the door. (R. at 298). TSgt JL testified, "He kept saying, I'm tired of waiting, let's try again the next day. I just want to leave." (R. at 298-299).

Appellant was eventually evaluated by a psychologist, and the evaluation ended with Appellant yelling at the psychologist that he did not want to stay overnight at the hospital. (R. at 238-239). After Appellant was told he would be staying overnight he made a few phone calls while in his hospital room. (R. at 241). MSgt AD (Appellant's section chief) and TSgt JL (Appellant's supervisor) sat in Appellant's hospital room while Appellant made the phone calls. (R. at 241; 265). MSgt AD overheard Appellant mention "a Reddit[2] post that he read and that doing some . . . the actions kind of sort of like this might help expedite the process for his separation." (R. at 241). Trial counsel asked MSgt AD, "And how did you interpret what this meant?" MSgt AD testified:

[2] Reddit is a website where users can view and share links or text posts for others to see. These posts range from pictures and videos to news and discussion threads.

> For this, I interpreted it as either getting treatment at mental health ***or making statements to see if maybe command can be pushed to expedite the process*** because the process had been stalled and it feels like it had been a long process. So, I assumed that this was the . . . with the day's events that had been happening. So, we were up at the . . . [Inaudible.] mental health where he potentially communicated a threat.

(R. at 241) (emphasis added). Trial counsel also asked TSgt JL (Appellant's supervisor) about the phone calls Appellant made. (R. at 265). TSgt JL heard Appellant say Appellant "read these Reddit posts, or read these posts on Reddit and making these comments would help him get home to Tennessee." (R. at 265).

ARGUMENT

I.

APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Under Article 66(d), UCMJ, the Court of Criminal Appeals reviews issues of legal and 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

Legal Sufficiency

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). The term reasonable doubt,

however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

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[3]:

> (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—
>
> > (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

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

> 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).

Communicating a Threat, Article 115, UCMJ

A conviction of communicating a threat in violation of Article 115, UCMJ, requires the government to prove three elements beyond a reasonable doubt: (1) "the accused communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future;" (2) "the communication was made known to that person or to a third person;" and (3) "the communication was wrongful." Manual for Courts-Martial, pt. IV, ¶ 53b.(1)(a) (2019 ed.).

Analysis

Appellant challenges the first and third elements of his communicating a threat conviction. The second element is uncontested. Appellant made the threat to a third party – a mental health technician – and the threat was overheard by two members of his chain of command. (R. at 236-237, 296-297). Thus, the second element is satisfied.

A. Although Appellant's statement contained a condition, the threat was not conditioned on a circumstance that could not occur. Thus, the threat was not negated.

The first element is an objective measure that evaluates the existence of a threat "from the point of view of a reasonable person." United States v. Rapert, 75 M.J. 164, 168 (C.A.A.F. 2016). "[This Court's] only concern is whether a reasonable factfinder could conclude beyond a reasonable doubt that a reasonable person in the recipient's place would perceive the contested statement by appellant to be a threat." United States v. Phillips, 42 M.J. 127, 130 (C..A.A.F. 1995). The first element could be written to read "the accused communicated certain language [that a reasonable person would understand as] expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future." MCM pt. IV, ¶ 53.b.(1)(a).

While the words used by Appellant are important, so are the circumstances in determining Appellant's intent in making the statement. United States v. Brown, 65 M.J. 227, 231-32 (C.A.A.F. 2007) (holding that divorcing words from the surroundings in which they were communicated and from their impact on the intended subject is illogical and unnatural; legal analysis of a threat must consider both the words used and the circumstances).

Three people heard Appellant's threat: the mental health technician at the Tripler emergency room, TSgt JL (Appellant's supervisor), and MSgt AD (Appellant's section chief). (R. at 236). MSgt AD then heard Appellant say, "[I]f he had to wait one more time, that he was

going to cut out the commander's or the flight chief's tongue and staple it to their chests." (R. at 236). A reasonable person in their positions and within the context of this case would perceive Appellant's words as communicating a threat to kill or seriously injure Appellant's commander and flight chief.

Appellant was extremely irritated and was tired of waiting at the emergency room. (R. at 296). Although Appellant used a normal tone, he did not make the statement in jest. (R. at 237, 257). Upon hearing the threat, MSgt AD (Appellant's section chief) looked to the emergency room personnel to see what their reaction was to the statement. (R. at 237). MSgt AD did not react to the statement because he determined they were already in the location you would take someone threatening others. (R. at 237). TSgt JL (Appellant's supervisor) had never seen that side of Appellant and was surprised but did not react. (R. at 297). It is reasonable to conclude the emergency room personnel and the escorts in the room would not react to avoid fueling a homicidal reaction from Appellant.

A reasonable factfinder could conclude beyond a reasonable doubt that a reasonable person in the recipient's place would perceive the contested statement by appellant to be a threat.

Appellant claims his "statement was conditional, meaning it did not express a present intent to harm another." (App. Br. at 12). But a threat with a condition does not automatically void the threat.

"If the threatened injury is stated to be contingent on the occurrence of some event that ***obviously cannot take place***, an accused is not criminally liable." United States v. Alford, 34 M.J. at 152 (C.M.A. 1992)(emphasis added). Appellant's threat was not conditioned upon "a circumstance that could never occur." Phillips, 42 M.J. at 131. The threat was conditioned upon

waiting in a doctor's office for a long time – a genuine possibility at a healthcare facility and a condition that ***obviously could take place***.

This case is like Alford. 34 M.J. at 152. In Alford, the appellant, an inmate at the time, assaulted another prisoner. Id. at 151. According to the victim, Appellant told him, "If I mentioned anything of this to any of the guards, about the incident, that [Appellant] would put me in a body bag at Evans Community Hospital." Id. The threat of putting the victim in a body bag was conditioned on the victim telling a guard about the physical assault. Our superior court determined, there was a reasonable possibility that the prisoner would report an assault by a fellow inmate to the guard because the guards were easily accessible and all he had to do was tell them of the attack. Id. at 152. The Court concluded that the condition or contingency was not impossible and did not negate the threat to put the victim "in a body bag" at a local hospital. Id. at 151.

In this case, there were no physical restraints keeping Appellant at bay, even though hospital security stepped in front of the door when Appellant tried to leave his room. (R. at 298). And Appellant's flight chief (MD), who was a subject of the threat, was in the parking lot of the emergency room. (R. at 296). In addition, there was a reasonable possibility that Appellant would be made to wait for medical providers. Thus, the condition of the threat could be fulfilled – Appellant could be forced "to wait one more time" before being treated. The condition did not make it impossible to act on the threat. Thus, the threat of Appellant cutting out his leadership's tongues and stapling them to their chests was not negated by the condition.

Appellant raised factual sufficiency but failed to prove that the finding of guilty was against the weight of the evidence simply because the threat contained a condition. The weight

of the evidence shows the government proved the first element beyond a reasonable doubt. Appellant made a threat, and the condition was not impossible to fulfill.

B. The communication was not made for a legitimate medical purpose. The statement was a guise to hasten Appellant's separation from the military. Thus, it was wrongful.

The third element looks at Appellant's intent in making the statement. A communication is wrongful if the accused transmitted the communication for the purpose of issuing a threat or knowledge that the communication will be viewed as a threat. MCM, pt. IV, ¶ 53(c)(2). It is unnecessary to establish that the accused intended to do the injury threatened. United States v. Dixon, No. ACM 39878 (f rev), 2022 CCA LEXIS 333, at *15 (A.F. Ct. Crim. App. June 6, 2022). A communication is not wrongful if the speaker intended the statements as a joke or idle banter or intended the statements to serve an innocent or legitimate purpose. Rapert, 75 M.J. at 169.

The government agrees with Appellant that one such legitimate purpose would be an accused communicating his state of mind to receive medical health care. United States v. Cotton, 40 M.J. 93 (C.M.A. 1994). But Cotton emphasized that "[b]oth the circumstances of the utterance and the literal language must be considered." Id. at 95. And Appellant did not communicate his state of mind to receive mental health care – he communicated a threat because he was being forced to wait, and he wanted to hasten his separation from the Air Force. (R. at 241, 265, 298-299). MSgt AD (Appellant's section chief) testified that Appellant's separation had "stalled." (R. at 241). And he believed Appellant's threat and comments to mental health were a means to push command to expedite the separation process. (Id.) But they were not statements for mental health treatment or to combat an actual mental health struggle because Appellant was not experiencing an actual mental health crisis – it was a guise to ensure to expedite his separation from the Air Force. TSgt JL (Appellant's supervisor) heard Appellant

say he was, "making these comments would help him get home to Tennessee." (R. at 265). Appellant made the threat and statements to mental health to leave Hawaii and return home to Tennessee, but he did not make them for the legitimate purpose of receiving medical health care.

Appellant cites Cotton and claims his "statement was not wrongful because he made it for the legitimate purpose of seeking mental health care." (App. Br. at 6). The appellant in Cotton told the social worker that nobody in his squadron cared about him and, out of the blue, stated that he'd have "no problem killing" his master sergeant. 40 M.J. at 93. The appellant's "literal language expressed what he would or should do to his first sergeant based on an unknown and unexpressed condition." Id. at 95. The Cotton court determined the vague statement was made to express the appellant's mental distress to then access mental health care. Id.

Appellant also cites United States v. Wright as an example of communicating a threat for receiving medical care. 65 M.J. 703 (N-M Ct. Crim App. 2007). In Wright, the appellant expressed anxiety over his upcoming deployment, and he anticipated being treated poorly by his leadership when he arrived in Iraq. Id. at 704. He explained if he was provoked "he would then injure his commanding officer, sergeant major, gunnery sergeant and staff sergeant by 'beating them to a pulp with his E-tool shovel.'" Id. The Wright court decided the threat was not wrongful because it was made while the appellant was discussing his condition with a mental health professional, to obtain a mental health evaluation and treatment. Id.

Unlike Cotton and Wright, Appellant's statement was not made for an innocent or legitimate purpose. Rapert, 75 M.J. at 169. Appellant was not describing the cause of his distress to facilitate evaluation and treatment. He made the threat, and when talking on the phone after threatening his chain of command, he said that "he read these posts on Reddit and making these comments would help him get home to Tennessee." (R. at 265). Appellant was

using a technique he learned on Reddit, and he went to mental health providers under a guise of needing treatment to move along his separation from the Air Force. (R. at 241). Making homicidal ideations against his chain of command was a way to catch the attention of mental health providers and expedite his separation from the military. His statement was wrongful because he was not joking or seeking actual medical attention, and he knew threatening to harm or kill his leadership would be "viewed as a threat." MCM, pt. IV, ¶53.c.(2). After reading Reddit posts, Appellant believed "making these comments would help him get home to Tennessee." (R. at 265).

Appellant raised factual sufficiency but failed to prove that the finding of guilty was against the weight of the evidence. Appellant made the threat to a third-party mental health provider, and in front of MSgt AD (Appellant's section chief), and TSgt JL (Appellant's supervisor), but the statement was not for a legitimate medical purpose. The weight of the evidence shows the government proved the third element beyond a reasonable doubt. Appellant made a serious threat to expedite his separation from the military.

The evidence meets the low threshold of legal sufficiency as any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, especially when the evidence is viewed in the light most favorable to the government. This Court should also be convinced that the evidence is factually sufficient because there is sufficient evidence to constitute proof of each required element beyond a reasonable doubt. 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.

II.

WHETHER A BAD-[CONDUCT] DISCHARGE IS INAPPROPRIATELY SEVERE CONSIDERING AIRMAN MYERS'S [CIRCUMSTANCES], THE NATURE AND SERIOUSNESS OF THE OFFENSES, AND MITIGATING CONTEXT.

Additional Facts

Appellant understood the maximum punishment for his guilty plea, and the maximum for all offenses charged at the special court-martial, was a bad conduct discharge, 12 months confinement, forfeiture of two-thirds pay for 12 months, reduction to E-1, and a reprimand. (R. at 93.)

False Official Statement (Specification 1, Charge II)

Appellant told TSgt JL (Appellant's supervisor) via text message that Appellant's mental health provider extended his quarters, but his provider had not done so. (R. at 59, 61, 62). Appellant provided TSgt L with a photo of a quarters slip allegedly authorizing the quarters extension. (R. at 60-61). But Appellant created the quarters slip, not the mental health provider. (R. at 63). Appellant intentionally deceived TSgt JL (Appellant's supervisor) to avoid going to work. (R. at 60). The quarters slip allowed Appellant to avoid work for five days. (R. at 64).

False Official Statement (Specification 2, Charge II)

Appellant told MSgt AD (Appellant's section chief) and MD (Appellant's flight chief) that he went to Tripler Army Medical Center and received new quarters for ten days. (R. at 67). Appellant created the paperwork authorizing new quarters, not his health care provider. (R. at 68). Appellant intentionally deceived MSgt AD (Appellant's section chief) and MD (Appellant's flight chief) to avoid going to work. (R. at 70). The quarters slip allowed Appellant to avoid work for ten days. (R. at 67).

Delta-9-Tretahydocannabinol Use (Specification, Charge III)

Between 22 February 2022 and 1 April 2022, Appellant used a controlled substance, Delta-9-Tretahydocannabinol (Delta-9), on divers occasions. (R. at 78). He took THC gummies on at least two occasions, and he knew he took them based on the packaging and because they made him feel relaxed. (Id.) Appellant also tested positive for Delta-9 during a urinalysis. (R. at 80).

Delta-9-Tretahydocannabinol Use (Specification, Additional Charge)

Between 16 June 2022 and 16 July 2022, Appellant used Delta-9, a controlled substance, once. (R. at 87). He again consumed a THC gummy, and he knew he took it based on the packaging and because it made him feel relaxed. (Id.). Appellant also tested positive for Delta-9 during a urinalysis. (R. at 91).

Sentencing Proceeding

During military judge alone sentencing, Appellant admitted four pages of family photos, and a copy of his Global War on Terrorism Service Medal and his Air Force Training Ribbon. (R. at 530; Def. Ex. B, H). Appellant also admitted five, character letters from his wife, mother, friend, aunt, and pastor. (Def. Ex. C-G). Appellant provided a written unsworn statement that did not mention his mental health struggles or their effect on his misconduct. (Def. Ex. I).

The government admitted Appellant's statement to Security Forces Investigators explaining that he bought marijuana gummies and ate them. (Pros. Ex. 5 at 2). Appellant bought gummies near the end of February 2022, and he claimed the gummies "REALLY helps me sleep and be more happy … so I microdosed every other night since." (Id.). Appellant's statement was made on 1 April 2022. (Id.).

Standard of Review

Under Article 66(d), UCMJ, the Court of Criminal Appeals reviews sentence appropriateness de novo. McAlhaney, 83 M.J. at 166 (C.A.A.F. 2023) (citing Lane, 64 M.J. at 2). "The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1)(A), UCMJ (2021).

Law and Analysis

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant's sentence should be affirmed as entered on the Entry of Judgment because Appellant received the punishment he deserved.

On appeal, Appellant blames his mental health struggles, claiming, "it is not a stretch to think these struggles affected his conduct." (App Br at 17). But Appellant's argument is not supported by any medical evidence. Appellant's struggles did not force him to doctor medical documents twice extending his quarters to get out of 15 days of work. (R. at 59, 60-63, 67-68, 70). His struggles did not pressure him to lie to his supervisors twice. (R. at 60, 70). His

struggles did not force him to consume Delta-9 on at least three occasions. (R. at 78-79, 87-88). His struggles did not compel him to threaten the lives of his chain of command. (R. at 236, 296-297). He *chose* to lie. He *chose* to consume Delta-9 over and over. He *chose* to threaten his leadership. Such conduct is repetitive, bad, and deserving of punishment.

Appellant claims "[t]he offenses for which he was convicted, even including communicating a threat, are also ***not especially serious*** and do not demand a bad-conduct discharge." (App. Br. at 18) (emphasis added). But Appellant's argument ignores the actual definition of a bad conduct discharge. Bad conduct discharge is "a punishment for bad-conduct ***rather than as a punishment for serious offenses*** of either a civilian or military nature." R.C.M. 1003(b)(8)(C)(emphasis added). A bad-conduct discharge does not require some level of severity. In fact, the exact opposite is true; multiple minor infractions could warrant a bad-conduct discharge. A bad-conduct discharge "is also appropriate for an accused who has been convicted ***repeatedly of minor offenses*** and whose punitive separation appears to be necessary." R.C.M. 1003(b)(8)(C)(emphasis added)

An adjudged sentence "is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing." R.C.M. 1002(a). The military judge considered the aggravating evidence and demonstrated his discretion as the sentencing authority by adjudging 165 days of confinement, well below the 12-month jurisdictional maximum, and ordering 75 days pretrial confinement credit. (*Entry of Judgment*, ROT, Vol. 1.) The military judge also recognized the repetitive nature of Appellant's bad conduct and determined a bad-conduct discharge was appropriate – a decision well within his discretion as the sentencing authority.

To expedite his military separation, Appellant threatened his leadership saying, "if he had to wait one more time, that he was going to cut out the commander's or the flight chief's tongue and staple it to their chests." (R. at 236, 237, 241). Appellant did not have a legitimate medical reason for threatening his leadership, and he intended it to be an actual threat or at least intended it to be perceived as a threat.

Appellant lied to his supervisors saying mental health extended his quarters when they had not done so. (R. at 60, 67). Appellant took the time to find a quarters slip, alter it, then send it to his leadership – twice. (R. at 60-61, 67). In total his actions allowed him to miss 15 days of work without taking leave. (R. at 64, 67).

Appellant knew mental health resources were available to him because he used them – specifically he was prescribed mental health medications such as Lexapro[4], Trazadone[5], and Robaxin[6] that would have required contact with mental health in the past. (Pros. Ex 2). But instead of leaning on the medical providers and communicating his needs to them, Appellant used Delta-9 to relax and calm himself. He could have reached out to his medical provider, the first sergeant, or a chaplain for help in dealing with stress . But he did not. He admitted during his guilty plea inquiry to taking Delta-9 on at least three occasions. (R. at 78, 87). His blatant disregard for Air Force resources and laws prohibiting drug use were aggravating evidence for the sentencing authority to consider.

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[4] Lexapro is a prescription antidepressant. https://www.ncbi.nlm.nih.gov/books/NBK557734/

[5] Trazadone is a prescription antidepressant. https://www.ncbi.nlm.nih.gov/books/NBK470560/#:~:text=Trazodone%20is%20an%20FDA%2Dapproved,in%20patients%20with%20sleep%20problems.

[6] Robaxin is a muscle relaxant. https://www.ncbi.nlm.nih.gov/books/NBK565868/

In addition, Appellant's statement to Security Forces investigators, admitted as a sentencing exhibit, showed he actually took Delta-9 upwards of 16 times based on his statement that he consumed the gummies every other day in March. (Pros. Ex. 5). His statement to Security Forces evidenced a continuing course of conduct that showed low rehabilitation potential for the drug offenses. *See* United States v. Melcher, 2013 CCA LEXIS 209, *10 (A.F. Ct. Crim. App. 2013) (Additional uses admitted at sentencing inform the sentencing authority's judgment for the charged offense and put the offense in context.)

The military judge considered any evidence of Appellant's mental state at the time of the offenses as matters in extenuation. R.C.M. 1001(d)(1)(A). And Appellant's guilty plea to four of five offenses was mitigation that the military judge could consider. United States v. Edwards, 35 M.J. 351, 355 (C.A.A.F. 1992). In addition, TSgt JL (Appellant's supervisor) and MD (Appellant's flight chief) testified Appellant's absence did not affect the mission because he had been removed from the section. (R. at 615; 625). These matters were considered in determining the sentence and weighed against the facts of the criminal offenses. Appellant's arguments have already been judged and an appropriate sentence was crafted based on the whole of the case. Appellant asks this court to engage in an act of clemency, which is not permitted under the law. The adjudged bad-conduct discharge was not inappropriately severe.

Even if this Court grants Appellant's requested relief for Issue I, a bad-conduct discharge is still appropriate for Appellant's remaining convictions. Appellant does not challenge the convictions for two false official statements that allowed him to avoid 15 days of work. And Appellant does not challenge his convictions for at least three uses of a controlled substance. For these four offenses alone, a bad conduct discharge is not inappropriately severe.

Appellant's conviction for communicating a threat was not erroneous. But if this Court determines Appellant's conviction for communicating a threat is legally and factually insufficient, then the adjudged 90 days of confinement for that offense should be set aside, but the bad conduct discharge should remain.

United States v. Winckelmann illustrates factors for consideration in sentence reassessment or a sentencing rehearing:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

73 M.J. 11, 15-16 (C.A.A.F. 2013). This Court would be able to conduct a sentencing reassessment in this case. First, because of the special court-martial forum and the other offenses charged, Appellant's penalty exposure remains the same – 12 months confinement and a bad-conduct discharge. MCM, A12-3; A12-4 (2019 ed.). Second, because Appellant chose military judge alone segmented sentencing, this Court can see how he divided the confinement for each offense and need only set aside the 90 days confinement for the affected offense. R.C.M. 1002(d)(2)(A). Third, as discussed above, a bad-conduct discharge was appropriate for

Appellant's remaining conduct even if the communicating a threat conviction is set aside. Fourth, and finally, this Court has a great deal of experience with false official statement offense and drug cases. All four factors favor a sentencing reassessment by this Court rather than a sentencing rehearing, but only if this Court determines Appellant's conviction for communicating a threat was legally and factually insufficient.

This Court should find Appellant's arguments unpersuasive and his sentence of a bad-conduct discharge appropriate. Appellant's claim does not warrant leniency. This Court should deny this assignment of error.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 March 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) **MAKINNON A. MYERS,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM S32749 14 March 2024

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

Appellant, Airman (Amn) Makinnon A. Myers, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Government's Answer, dated 7 March 2024 (Ans.). In addition to the arguments in his opening brief, filed on 6 February 2024 and amended on 9 February 2024, Amn Myers submits the following arguments for the issues listed below.

I.

The conviction for communicating a threat is legally and factually insufficient because Airman Myers made the charged statement to a medical professional while seeking mental-health care and the statement was conditional.

1. Amn Myers made the charged statement to a mental-health provider for the legitimate purpose of seeking mental-health care, so the statement was not wrongful.

By its emphasis on considering "[b]oth the circumstances of the utterance and the literal language," Ans. at 11 (quoting *United States v. Cotton*, 40 M.J. 93, 95 (C.M.A. 1994)), the Government's answer acknowledges the law, but then fails to follow it, ignoring many of the circumstances central to the charged statement. It does not mention many indicia of Amn Myers's mental health crisis that day, including, for example, the two diagnostic tests for depression and anxiety which both classified him as "severe." R. at 348, 379; Pros. Ex. 2 at 2. The statement of

facts acknowledges some notes from his evaluation which record concerns about thoughts of harming others and a statement to Maj C.H. about wanting to harm someone in the waiting room. Ans. at 2–3. However, the argument does not account for any of these or his other, more detailed descriptions to Maj C.H. of the troubling thoughts and mental stressors he was experiencing. Ans. at 11–13; R. at 369–70. It also does not acknowledge how seriously the mental-health professionals treated the situation, with Maj C.H. deciding Amn Myers needed to be hospitalized, which she described as a "last resort." R. at 389–91. All of these circumstances are consistent with the mental distress he later communicated to the mental-health professional in the charged statement.

Crucially, the Government completely ignores the fact, as recorded in his medical records, that Amn Myers went to the hospital voluntarily even though he knew it could prolong his discharge. Pros. Ex. 2 at 1; R. at 378. This fact directly contradicts the Government's argument that Amn Myers's mental health crisis and his statements to mental health providers, including the charged statement, were "a guise to ensure to expedite his separation from the Air Force." Ans. at 11. By voluntarily going to the hospital, Amn Myers knowingly took an action which was consistent with seeking mental-health treatment and inconsistent with the supposed ulterior motive which the Government attempts to ascribe to him. Just like in *Cotton*, the totality of the circumstances shows that Amn Myers was legitimately seeking treatment, "made the utterance to a health professional while describing the cause of his distress," and "was describing his state of mind" in response to the provider's questions. 40 M.J. at 95. Therefore, the weight of the evidence indicates the utterance does not constitute communicating a threat. *Id.*; *see also United States v. Wright*, 65 M.J. 703, 705 (N-M. Ct. Crim. App. 2007) (holding "statements (1) uttered in the context of an exchange of information with medical personnel, (2) which express the declarant's

current mental state or distress, and (3) which are uttered for the purpose of obtaining medical evaluation and treatment are not wrongful and do not constitute communicating a threat").

Beyond overlooking this evidence in the record that Amn Myers was, in fact, doing what he told the providers he was doing–namely, seeking medical attention in a moment of crisis–the Government relies upon a single purported comment regarding the website Reddit. Ans. at 11–13. This is insufficient to meet the Government's burden of proving, beyond a reasonable doubt, that the charged statement was not made for a legitimate purpose for three reasons: 1) the Government's answer overstates the number of witnesses to this comment; 2) the lone witness testified about his own interpretations and assumptions; and 3) even if Amn Myers made the purported statement, this evidence is subject to multiple interpretations. First, the Government's answer overstates the strength of the evidence by incorrectly claiming two witnesses, MSgt A.D. and TSgt J.L., testified about this alleged comment. *Id.* at 4– 5, 11–12 (citing R. at 265). The testimony that the Government attributes to TSgt J.L. actually came from MSgt A.D. R. at 265. TSgt J.L. testified he did not hear anyone mention anything about Reddit. R. at 396. Thus, the account of this comment came from just one witness.

The lone witness to this supposed comment, MSgt A.D., acknowledged that he did not remember much about this discussion. R. at 254–55. Much of the testimony he ultimately gave was expressly based on his interpretation of or his assumptions about this statement. R. at 241, 265–66. For instance, trial counsel asked MSgt A.D. how he interpreted the reported comment, and MSgt A.D. reiterated that this was his interpretation and later stated something he "assumed." R. at 241. Likewise, trial counsel again asked MSgt A.D. about his interpretation of this purported comment on redirect examination. R. at 265–66. This speculation from MSgt A.D. is not an account of what Amn Myers said or thought, which is what matters here.

Finally, the statement itself is ambiguous and open to multiple interpretations, some of which are consistent with legitimately seeking mental-health treatment. Amn Myers could have been both legitimately seeking mental-health care and hoping that doing so would expedite his discharge. Indeed, frustration over a prolonged discharge process may have contributed to his legitimate mental distress. MSgt A.D. even noted this in testimony highlighted by the Government when he said, "I interpreted it as either *getting treatment at mental health* or making statements to see if maybe command can be pushed to expedite the process." R. at 241 (emphasis added); Ans. at 5. After considering the testimony from a single witness about this ambiguous statement, this Court should have reasonable doubt as to whether the statement was not made for a legitimate purpose, meaning the Government has not met its burden.

The weakness of the Government's argument is underscored by its contradictory positions regarding Amn Myers seeking mental-health treatment. While addressing the specifications for use of tetrahydrocannabinol (THC) later in its answer, the Government ironically asserts that Amn Myers could have sought mental-health care. Ans. at 18. Acknowledging his mental-health history, the Government argues he "knew mental health resources were available to him because he used them" and that he "could have reached out to his medical provider," which he did on the day of the charged statement. *Id.* The Government further emphasizes that he used THC "instead of leaning on the medical providers *and communicating his needs to them*." *Id.* (emphasis added). Yet, when considering his actual communication to a mental-health professional about his mental status and needs, the Government argues it was really a guise. *See id.* at 11–13. Taken together, these assertions put Amn Myers in an impossible position: he is expected to seek mental-health care and communicate with the providers, but when he does so, his statement is viewed as a guise and treated as criminal misconduct. Amn Myers did exactly what the Government says he should

have done by communicating his state of mind and the cause of his mental distress to a mental-health provider, and the resulting conviction for communicating a threat is therefore legally and factually insufficient.

2. The conditional nature of Amn Myers's statement means he did not express a present determination to harm another.

The conditional nature of a statement can mean it does not express a present determination to harm another, even if the condition could occur. The Government relies too heavily on the notion that the condition in the charged statement was one "that obviously could take place." Ans. at 9–10. As the Government notes, the court in *United States v. Alford* observed, "If the threatened injury is stated to be contingent on the occurrence of some event that obviously cannot take place, an accused is not criminally liable." 34 M.J. 150, 152 (C.M.A. 1992). However, it does not follow that an accused is necessarily criminally liable simply because a stated condition could take place. While finding the appellant's language in *Alford* was sufficiently clear to express a present determination to harm another, the court distinguished two unpublished cases in which language expressing possible conditions was still not definite enough to constitute communicating a threat.[1] *Id.* In one case, the accused "said 'that he was so mad that he could kill' a named captain and 'that he might come back and shoot' the captain." *Id.* (quoting *United States v. Batdorf*, ACMR 8801445, at 1 (decided Dec. 23, 1988) (unpub. op.)). Even though the condition in this statement–the accused's anger–was both possible and seemingly already met, that court held the language "was 'not sufficiently definite or certain to meet' the requirements of a threat." *Id.* Similarly, the court discussed another case in which the accused pleaded guilty "where the alleged threat was,

[1] The two unpublished cases discussed in *Alford*, *United States v. Batdorf* and *United States v. DeMello*, are not available in the LexisNexis database. Thus, discussion of these cases is limited to their treatment in *Alford*. 34 M.J. at 152.

'If you ever say anything racial to me again, I -- I'll kill you.'" *Id.* (quoting *United States v. DeMello*, ACMR 8901251, at 1–2 (decided Oct. 20, 1989) (unpub. op.)). Even though this condition–saying something racial to the accused–was clearly possible, that court and the government agreed the guilty plea was improvident because the statement "did not express a present determination or intent to kill as alleged." *Id.* Thus, even the court's opinion in *Alford*, on which the Government relies, recognizes that some statements conditioned on events that could take place still do not constitute threats. *Id.*

The statement at issue here is more like the statement in *Cotton* than the one in *Alford*. 40 M.J. at 95; 34 M.J at 92. Both witnesses to the statement testified that the condition was if Amn Myers had to "wait one more time." R. at 236, 296–97. The Government interprets this to mean "waiting in a doctor's office for a long time," but it could also mean waiting for his discharge or waiting for something else. Ans. at 9–10. The condition is not clear, making it similar to that in *Cotton*. 40 M.J. at 95. The condition is also far less clear than that in *Alford*, where the appellant told the victim he would injure him if he reported an assault to confinement officials. 40 M.J. at 92. The condition need not be fully impossible to render the conviction insufficient, and the conditional nature of Amn Myers's purported statement means it was "not sufficiently definite or certain" to constitute a threat. *Alford*, 34 M.J. at 152 (quoting *Batdorf*, ACMR 8801445, at 1). The uncertainty from the conditional nature of the statement means there was no "expressed present determination or intent" to harm another. *Manual for Courts-Martial*, ¶ 53(c)(1) (2019). Especially when combined with the reality that Amn Myers was describing his state of mind and the cause of his distress to a mental-health professional while seeking treatment, this makes the conviction for communicating a threat legally and factually insufficient.

WHEREFORE, Amn Myers respectfully requests that this Honorable Court set aside the

findings of guilty as to Charge I and its Specification, dismiss Charge I and its Specification, and reassess the sentence to reduction to the grade of E-1 and confinement for 75 days.

II.

A bad-conduct discharge is inappropriately severe considering Airman Myers's circumstances, the nature and seriousness of the offenses, and the mitigating context, and the other sentence components adequately address the seriousness of the offenses.

Amn Myers largely stands on the opening brief for this issue. However, the Government's answer includes a notable error in its analysis. When considering whether a sentence reassessment or a sentence rehearing is appropriate, *United States v. Winckelmann* provides four factors, the third of which reads, "Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses." 73 M.J. 11, 16 (C.A.A.F. 2013). The Government argues this factor favors sentence reassessment because "a bad-conduct discharge was appropriate for [Amn Myers's] remaining conduct even if the communicating a threat conviction is set aside." Ans. at 20–21. This reasoning does not address either the gravamen of criminal conduct captured by remaining offenses or whether significant or aggravating circumstances remain admissible and relevant. *Winckelmann*, 73 M.J. at 16. Rather, the Government is essentially arguing that this factor favors sentence reassessment because Amn Myers should still receive the same sentence, using the Government's desired conclusion as a reason to select the process. This is faulty reasoning, and although Amn Myers recognizes that the other factors weigh in favor of sentence reassessment, this Court should not adopt the Government's reasoning on this factor or weigh it in favor of reassessment. *See* Br. on Behalf of Appellant at 14.

WHEREFORE, Amn Myers respectfully requests that this Honorable Court not approve

the bad-conduct discharge.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

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