IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A), UCMJ**
v.	)	
	)	
Technical Sergeant (E-6)	)	No. ACM _____
DOUGLAS M. FOLTS	)	
United States Air Force	)	22 February 2023
Appellant	)	

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

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Douglas Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ).[1] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months.

On 6 July 2022, the Article 65(d) review was completed. TSgt Folts has not yet submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. He also has not received any notification regarding his right to appeal under the amended Article 66(b)(1)(A). However, since his case currently is on appeal, the change to Article 66 should apply to him and therefore, this Court has jurisdiction to consider an appeal from his conviction. *See United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010) ("on direct review, we apply the clear law at the time of appeal, not the time of trial.") (citations omitted).

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[1] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ.

Therefore, TSgt Folts respectfully files his notice of direct appeal with this Court.

Respectfully submitted,

Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

CERTIFICATE OF FILING AND SERVICE

I certify that this document was sent via email to the Court and the Appellate Government Division on 22 February 2023.

Respectfully submitted,

Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. TSgt Douglas Folts ACM: N/A

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

I hereby certify that I am admitted to practice before this court.

15 September 2022
Date

Signature

Terri R. Zimmermann
Print Name Bar Number

Address

City State Zip Code

Phone Number E-Mail

Print Reset

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40322**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Douglas M. FOLTS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was received by this court in the above-styled case on 22 February 2023. On 23 February 2023, the record of trial was received by the Military Appellate Records Branch (JAJM).

Accordingly, it is by the court on this 24h day of February, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 1.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO COMPEL**
Appellee	)	**VERBATIM TRANSCRIPT**
	)	
v.	)	
	)	
Technical Sergeant (E-6)	)	No. ACM 40322
DOUGLAS M. FOLTS	)	
United States Air Force	)	11 April 2023
Appellant	)	

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial 1114(a)(2), TSgt Douglas Folts respectfully moves to compel production of a verbatim transcript in his case.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ).[1] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. Only a summarized transcript exists.

On 24 February 2023, this Court docketed the case for review under Article 66, UCMJ. In order to adequately conduct its review to determine what findings and sentence are correct in law and should be approved, the Court needs the entire record, including a verbatim transcript, to review. Undersigned civilian appellate defense counsel served as trial defense counsel and represents to the Court there is

[1] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ.

a significant appellate issue with respect to sufficiency of the evidence. In order to raise and litigate this and other appellate issues, counsel for both sides also need a verbatim transcript.

Therefore, TSgt Folts respectfully asks the Court to compel a verbatim transcript to be attached to the record.

Respectfully submitted,

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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

CERTIFICATE OF FILING AND SERVICE

I certify that this document was sent via email to the Court and the Appellate Government Division on 11 April 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

11 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO COMPEL VERBATIM TRANSCRIPT ACM 40322 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's motion to compel production of a verbatim transcript.

WHEREFORE, the United States respectfully requests that this Court grant Appellant's 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 11 April 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 40322**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Douglas M. FOLTS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 23 February 2023, Appellant filed a notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A), which the court docketed on 24 February 2023.

On 11 April 2023, counsel for Appellant filed a Motion to Compel Verbatim Transcript. Appellant's counsel state that in order for this court to adequately conduct its Article 66, UCMJ, review, the court needs the entire record, including a verbatim transcript, and "[o]nly a summarized transcript exists." Further, since civilian appellate defense counsel served as Appellant's trial defense counsel, such counsel is aware that there is "a significant appellate issue with respect to sufficiency of the evidence," thus requiring a verbatim transcript "for both sides."

The Government does not oppose the motion.

Accordingly, it is by the court on this 14th day of April, 2023,

ORDERED:

The Appellant's Motion to Compel Verbatim Transcript is **GRANTED**. The Government will produce a verbatim transcript to the court, appellate defense counsel, and appellate government counsel not later than **13 June 2023**.

If **t**he verbatim transcript cannot be returned to the court by that date, the Government will inform the court in writing not later than **8 June 2023** of the status of the Government's compliance with this order.

It is further ordered:

Appellant's brief will be submitted in accordance with the timeline established in this court's Rules of Practice and Procedure, A.F. Ct. Crim. App.

R. 18; however, the court will entertain a request for enlargement of time should the Appellant require additional time. *See* A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force *Appellant*	)	No. ACM 40322 18 April 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 **24 June 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

On 14 April 2023, this Honorable Court ordered the Government to produce a verbatim transcript to this Court, appellate defense counsel, and appellate government counsel not later than 13 June 2023. As of this filing, the Government has not yet produced the verbatim transcript.

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 18 April 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

18 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Panel No. 1

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

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

WHEREFORE, the United States respectfully requests that this Court grant 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 18 April 2023.

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

22 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Technical Sergeant (E-6) **DOUGLAS M. FOLTS** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE FOR COURT TO AMEND ORDER** Before Panel No. 1 No. ACM 40322

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

The United States respectfully moves to withdraw its 12 May 2023 Motion for Extension of Time.

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file to request the Court amend it's 14 April 2023 order to produce a verbatim transcript in this case. The United States respectfully request the Court amend its order to extend the deadline to produce the verbatim transcript until 5 July 2023. The current date ordered for production is 13 June 2023. The requested deadline will result in a 23-day extension to the original production date.

This case was docketed with the Court on 24 February 2023. Since docketing, Appellant has been granted one (1) enlargement of time. The United States has not made any requests for enlargement of time beyond the one we are requesting to withdraw. On the date of the extension requested, 131 days will have elapsed.

The justification for this request of 23 days is to provide adequate time for the audio to be transcribed at the request of the Court Reporter Administrator at the Air Force Trial Judiciary. The audio for United States v. Folts is over 38 hours long. In order to expedite the process, the Air Force Trial Judiciary has assigned several court reporters to assist the detailed court reporter.

However, after completion of the transcription, the transcript still needs to be certified by counsel and the detailed court reporter, which will take additional time. Based on a pre-existing heavy workload, the detailed court reporter does not expect to be able to complete the transcript until 5 July 2023.

For these reasons, the United States respectfully requests the Court amend its order to produce a verbatim transcript to reflect a new due date of 5 July 2023.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 22 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 (SECOND)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force *Appellant*	)	No. ACM 40322 15 June 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 July 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1] Record (R.) at 311. The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 334. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

[1] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 311.

The record of trial is eight volumes consisting of 10 prosecution exhibits, 40 defense exhibits, 66 appellate exhibits, and one court exhibit; the summarized transcript is 334 pages. Appellant is not currently confined.

On 14 April 2023, this Honorable Court ordered the Government to produce a verbatim transcript to this Court, appellate defense counsel, and appellate government counsel not later than 13 June 2023. On 22 May 2023, the Government requested this Court amend its order to extend the deadline to produce the verbatim transcript until 5 July 2023. This Court granted the Government's request on 31 May 2023. As of this filing, the Government has not yet produced the verbatim transcript. Without a verbatim transcript, and through no fault of Appellant, undersigned counsel and civilian appellate defense counsel have been unable to complete a review and prepare a brief for Appellant's case. An enlargement of time is necessary for counsel to receive the verbatim transcript, fully review Appellant's case, and advise Appellant regarding any 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 15 June 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

15 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Panel No. 1

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

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

WHEREFORE, the United States respectfully requests that this Court grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 15 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

29 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Technical Sergeant (E-6) **DOUGLAS M. FOLTS** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE FOR COURT TO AMEND ORDER** Before Panel No. 1 No. ACM 40322

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file to request the Court amend it's 14 April 2023 order to produce a verbatim transcript in this case. The United States respectfully request the Court amend its order to extend the deadline to produce the verbatim transcript until 21 July 2023. The current date ordered for production is 5 July 2023, as amended on 31 May 2023 by request from the United States. The requested deadline will result in a 38-day extension to the original production date of 13 June 2023.

This case was docketed with the Court on 24 February 2023. Since docketing, Appellant has been granted two (2) enlargements of time. The United States previously requested the Court amend its original ruling with a 23-day extension to the filing deadline. On the date of the extension requested, 147 days will have elapsed.

The justification for this request of an additional 16 days is to provide adequate time for counsel to review and certify the transcript. The transcript totals 2,141 pages. The court reporter has transcribed the audio and sent the final portion on 16 June 2023 to counsel. She set a suspense for review and certification by counsel for 30 June 2023; however, trial defense counsel requested an extension to finish his review. The court reporter will not receive the transcript

back by the 30 June 2023 suspense and still needs to draft an index and chronology. Additionally, the court reporter will be on temporary duty

For these reasons, the United States respectfully requests the Court amend its order to produce a verbatim transcript to reflect a new due date of 21 July 2023.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 29 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 (THIRD)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force *Appellant*	)	No. ACM 40322 17 July 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 August 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1] Record (R.) at 311. The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 334. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

[1] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 311.

The record of trial is eight volumes consisting of 10 prosecution exhibits, 40 defense exhibits, 66 appellate exhibits, and one court exhibit; the summarized transcript is 334 pages. Appellant is not currently confined.

On 14 April 2023, this Honorable Court ordered the Government to produce a verbatim transcript to this Court, appellate defense counsel, and appellate government counsel not later than 13 June 2023. On 22 May 2023, the Government requested this Court amend its order to extend the deadline to produce the verbatim transcript until 5 July 2023. This Court granted the Government's request on 31 May 2023. On 29 June 2023, the Government requested an additional amendment of the Court's order to extend the deadline until 21 July 2023. This Court granted the Government's request on 5 July 2023. As of this filing, appellate defense counsel have not received the verbatim transcript. Without a verbatim transcript, and through no fault of Appellant, undersigned counsel and civilian appellate defense counsel have been unable to complete a review and prepare a brief for Appellant's case. An enlargement of time is necessary for counsel to receive the verbatim transcript, fully review Appellant's case, and advise Appellant regarding any 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 17 July 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

17 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Panel No. 1

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

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

WHEREFORE, the United States respectfully requests that this Court grant 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 17 July 2023.

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

21 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' MOTION FOR LEAVE TO FILE FOR COURT TO AMEND ORDER (SECOND)**
v.	)	
Technical Sergeant (E-6) **DOUGLAS M. FOLTS** USAF, *Appellant.*	)	Before Panel No. 1
	)	No. ACM 40322

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file to request the Court amend it's 14 April 2023 order to produce a verbatim transcript in this case. The United States respectfully requests the Court amend its order to extend the deadline to produce the verbatim transcript until 28 July 2023. The current date ordered for production is 21 July 2023.

An additional 7 days is needed to ensure a hard copy verbatim transcript with sealed materials is delivered to the Court. The hard copy transcript has been completed and will be mailed to JAJG from Eielson AFB, Alaska today. However, given the logistics of expedited mailing from Alaska, the Eielson legal office avers that the hard copy transcript will probably not arrive at Andrews until next week. When the hard copy transcript is received, JAJG will promptly file it with a motion to attach on this Court. An electronic verbatim transcript, minus the sealed materials, has been filed on the parties and the Court today. Undersigned counsel was just informed today by the court reporter about the existence of sealed portions of the transcript, so the need to file a hard copy with the sealed portions on the Court only came to her attention today.

For these reasons, the United States respectfully requests the Court amend its order to produce a verbatim transcript to reflect a new due date of 28 July 2023.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian appellate defense counsel and to the Appellate Defense Division on 21 July 2023.

MARY ELLEN PAYNE
Associate Chief
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	)	**UNITED STATES' MOTION**
Appellee	)	**TO ATTACH DOCUMENTS**
	)	
v.	)	Before Panel No. 2
	)	
Technical Sergeant (E-6)	)	No. ACM 40322
DOUGLAS M. FOLTS,	)	
United States Air Force	)	21 July 2023
Appellant	)	

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

A. Appendix A – Part I: General Court-Martial Verbatim Transcript - *United States v. Technical Sergeant Douglas M. Folts,* dated 1 October 2023 (1260 pages)

B. Appendix B – Part 2: General Court-Martial Verbatim Transcript - *United States v. Technical Sergeant Douglas M. Folts,* dated 1 October 2023 (722 pages)

On 14 April 2023, this Court ordered the Government to prepare a verbatim transcript in this case. (*Order*, dated 14 April 2023). These appendices are responsive to the Court's order. The attached files do not contain any sealed portions of the transcripts. The sealed portions of the transcript will likely be delivered to this Court in hard copy sometime next week. Later today, the United States intends to file a motion for the Court to amend its previous order in the case setting a deadline for providing the verbatim transcript to the Court.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 21 July 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

28 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Technical Sergeant (E-6) **DOUGLAS M. FOLTS** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE FOR COURT TO AMEND ORDER (THIRD)** Before Panel No. 1 No. ACM 40322

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file to request the Court amend its 14 April 2023 order to produce a verbatim transcript in this case. The United States respectfully requests the Court amend its order to extend the deadline to produce the verbatim transcript until 3 August 2023. The current date ordered for production is 28 July 2023.

An additional 4 business days is needed to ensure a hard copy verbatim transcript with sealed materials is delivered to the Court. The hard copy transcript was mailed to JAJG from Eielson AFB, Alaska on 21 July 2023. According to the package's tracking information, the hard copy transcript will arrive to Andrews by 2100 hours on 28 July 2023. When the hard copy transcript is received, JAJG will promptly file it with a motion to attach to this Court. An electronic verbatim transcript, without the sealed materials, was served on the parties and the Court on 21 July 2023.

For these reasons, the United States respectfully requests the Court amend its order to produce a verbatim transcript to reflect a new due date of 3 August 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

FOR

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

CERTIFICATE OF FILING AND SERVICE

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

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40322**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Douglas M. FOLTS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., 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*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force *Appellant*	)	No. ACM 40322 1 August 2023

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

A. Appendix – General Court Martial Verbatim Transcript with sealed material – United States v. Technical Sergeant Douglas M. Folts, dated, 1 October 2021 (7 volumes, 2053 pages)

On 14 April 2023, this Court ordered the Government to prepare a verbatim transcript in this case. (*Order*, dated 14 April 2023). These appendices are responsive to the Court's order. The attached files contain a hard copy of the transcript with all sealed portions of the transcript included. Since the attachment contains sealed materials, it will only be delivered to the Court. An electronic version of the unsealed portions of the transcript was already delivered to counsel for all parties.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court on 1 August 2023. A copy of the motion without attachment was delivered to civilian defense counsel and the Appellate Defense Division.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, 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. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Special Panel No. ACM 40322 15 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **22 September 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. Record (R.) at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the

[1] All citations to the Record are to the *combined* verbatim transcript—minus sealed materials—provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.
[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Honorable Court ordered the Government to produce a verbatim transcript to this Court, appellate defense counsel, and appellate government counsel not later than 13 June 2023. On 22 May 2023, the Government requested this Court amend its order to extend the deadline to produce the verbatim transcript until 5 July 2023. This Court granted the Government's request on 31 May 2023. On 29 June 2023, the Government requested an additional amendment of the Court's order to extend the deadline until 21 July 2023. This Court granted the Government's request on 5 July 2023. Appellate defense counsel received the verbatim transcript, without sealed materials, on 21 July 2023.

In the same 14 April 2023 order to produce a verbatim transcript, this Honorable Court ordered that the Appellant's brief be submitted in accordance with the timeline established in Rule 18 of this Honorable Court's Rules of Practice and Procedure, while noting requests for enlargements of time will be entertained should they be needed. From 14 April 2023 to 21 July 2023, while appellate defense counsel waited for a verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten prosecution exhibits, 40 defense exhibits, 66 appellate exhibits, and one court exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript produced by the Government is a combined total of 2,141 pages. TSgt Folts is not currently confined.

Since moving for a third enlargement of time, the previously assigned military appellate defense counsel has transitioned out of the Appellate Defense Division and the undersigned

military counsel was assigned to this case on 17 July 2023. The undersigned military appellate counsel's first full day in the Appellate Defense Division was 31 July 2023.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information.

Military appellate defense counsel is currently assigned fourteen cases; nine cases are pending initial AOEs before this Court and one case is pending a grant brief before the United States Court of Appeals for the Armed Forces (CAAF). On 8 August 2023, the undersigned counsel reviewed, finalized, and filed a Supplement to the Petition for Grant of Review at the CAAF for *United States v. Wells*, USCA Dkt. No. 23-0219/AF. Since then—and currently—four cases have had priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The CAAF granted review on two issues on 20 July 2023. Appellant's brief and the joint appendix are due in accordance with the CAAF's order on 21 August 2023.

2. *United States v. Trueman*, ACM 40404 – The trial transcript is 134 pages long and the record of trial consists of two volumes containing three prosecution exhibits, zero defense exhibits, two appellate exhibits, and one court exhibit. Appellant is not currently in confinement. Counsel has not yet completed her review of the record of trial.

3. *United States v. Bak,* ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, two defense exhibits, nine appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

4. *United States v. Baumgartner*, ACM 40413 – The trial transcript is 797 pages long and the record of trial is seven volumes consisting of six prosecution exhibits, 17 defense exhibits,

44 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

Civilian appellate defense counsel, Ms. Terri Zimmermann, was TSgt Folts' civilian defense counsel at trial and has been retained to represent TSgt Folts on appeal as well. Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. Additionally, in her capacity as a Marine Corps Reserve judge advocate, she served as Acting Chief Defense Counsel of the Marine Corps

While Ms. Zimmermann has additional clients and pending matters, the ones listed below are more time-sensitive and will interfere with her ability to complete her review of the record in TSgt Folts' case, research the factual and legal issues, consult with military appellate defense counsel and TSgt Folts, and draft the brief. She has reviewed the verbatim transcript in her role as trial defense counsel but has not yet had an opportunity to review the official record.

Civilian appellate defense counsel has the following case priorities:

1. *United States v. Maj Gen Cooley,* ACM 40376 – pending in this Court. This is a direct appeal after Maj Gen Cooley was convicted of violating Article 120, UCMJ, and sentenced to a reprimand and significant forfeitures. This Court denied a Government Motion to Dismiss for lack of jurisdiction, but on 7 August 2023, the Government filed a Motion for Reconsideration. Our response was due on 14 August 2023, but we requested an extension due to civilian appellate defense counsel's unavailability prior to 14 August 2023 due to being on military orders. We hope to file our response on or before 17 August 2023.

2. *United States v. 1LT Badders*, ACM ARMY 2020538 – appeal of Article 120, UCMJ, conviction pending at the Army Court of Criminal Appeals. The Government's Answer is due on 14 August 2023, making our Reply Brief due on 21 August 2023.

3. *United States v. Capt Knodel*, ACM 40018 – appeal of Article 120, UCMJ, conviction pending in this Court. This Court ordered a post-trial factfinding hearing which took place in January 2023. The Government filed the unsealed portion of the military judge's Findings of Fact on 11 August 2023 and will file the sealed portion when they receive it from the military judge (who mailed the hard copy). Pursuant to the *Dubay* Hearing Order, we have 30 days from when the Findings are filed to submit a supplemental brief.

4. *United States v. CW3 Geranen*, ACM ARMY 20210306 – the Army Court of Criminal Appeals issued a Memorandum opinion on 1 August 2023 denying relief for this Article 120, UCMJ, conviction. We are preparing a Petition for Grant of Review and Supplement to the Petition for Grant of Review, due on 1 October 2023.

Through no fault of TSgt Folts, undersigned counsel have been unable complete their review of his case. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case and advise him regarding potential errors.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 15 August 2023.

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

16 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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

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

WHEREFORE, the United States respectfully requests that this Court grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 16 August 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Special Panel
Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	)	No. ACM 40322 22 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. Captain Samantha Castanien has been detailed substitute appellate military counsel in undersigned counsel's stead and made her notice of appearance on 15 August 2023. Ms. Terri Zimmerman, appellate civilian counsel, also represents Appellant. 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 22 August 2023.

SAMANTHA M. CASTANIEN, Capt, 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. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Special Panel No. ACM 40322 14 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **22 October 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript—minus sealed materials—provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Honorable Court ordered the Government to produce a verbatim transcript to this Court, appellate defense counsel, and appellate government counsel not later than 13 June 2023. In the same 14 April 2023 order to produce a verbatim transcript, this Honorable Court ordered that the Appellant's brief be submitted in accordance with the timeline established in Rule 18 of this Honorable Court's Rules of Practice and Procedure, while noting requests for enlargements of time will be entertained should they be needed. From 14 April 2023 to 21 July 2023, the date Appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten prosecution exhibits, 40 defense exhibits, 66 appellate exhibits, and one court exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript produced by the Government is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Since the last enlargement of time, undersigned counsel filed a Motion to Examine Sealed Material, which required the existence of the verbatim transcript. Counsel will need to inspect the sealed materials before completing their review of the record.

Military appellate defense counsel is currently assigned sixteen cases; ten cases are pending initial AOEs before this Court and two cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Five cases have priority over the present case:

1. *In Re HVZ*, USCA Dkt. No. 23-0250/AF – The Judge Advocate General of the Air Force certified for review four issues, which were docketed by the CAAF on 13 September 2023. The Real Party in Interest's brief is due on 23 September 2023.

2. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The Government's Answer is expected on 20 September 2023, making the Reply due on 30 September 2023. Oral argument is anticipated to occur by the end of the year.

3. *United States v. Trueman*, ACM 40404 – A Motion to Withdraw from Appellate Review was filed in this case on 13 September 2023, after military appellate defense counsel completed her review of the record. At the time of this filing, the request for withdrawal is pending action by this Court, and, as such, this case remains a priority over TSgt Folts' case.

4. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, two defense exhibits, nine appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not yet completed her review of the record of trial, but has examined all the sealed materials in the case.

5. *United States v. Baumgartner*, ACM 40413 – The trial transcript is 797 pages long and the record of trial is seven volumes consisting of six prosecution exhibits, 17 defense exhibits, 44 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

Civilian appellate defense counsel, Ms. Terri Zimmermann, was TSgt Folts' civilian defense counsel at trial and has been retained to represent TSgt Folts on appeal as well. Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. While Ms. Zimmermann has additional clients and pending matters, the ones listed below are more

time-sensitive and will interfere with her ability to complete her review of the record in TSgt Folts' case, research the factual and legal issues, consult with military appellate defense counsel and TSgt Folts, and draft the brief. She has reviewed the verbatim transcript in her role as trial defense counsel but has not yet had an opportunity to review the official record.

Civilian appellate defense counsel has the following case priorities:

1. *United States v. Capt Knodel*, ACM 40018 – Appeal of an Article 120, UCMJ, conviction pending in this Court. This Court ordered a post-trial factfinding hearing which took place in January 2023. Pursuant to the *Dubay* Hearing Order, a supplemental brief is due on 5 October 2023. Appellate defense counsel also intends to file two supplemental AOEs and objections to the military judge's findings of fact from the *Dubay* hearing, to be filed at or near 5 October 2023.

2. *United States v. CW3 Geranen*, ACM ARMY 20210306 – The Army Court of Criminal Appeals issued a Memorandum opinion on 1 August 2023 denying relief for this Article 120, UCMJ, conviction. Appellate defense counsel is preparing a Petition for Grant of Review and Supplement to the Petition for Grant of Review, due on 1 October 2023.

Through no fault of TSgt Folts, undersigned counsel have been unable complete their review of his case. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case and advise him regarding potential errors.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 14 September 2023.

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

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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

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

WHEREFORE, the United States respectfully requests that this Court grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 18 September 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,* v. Technical Sergeant (E-6), **DOUGLAS M. FOLTS**, United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL AND TRANSMIT TO CIVILIAN COUNSEL** Before Special Panel No. ACM 40322 14 September 2023

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant Folts hereby moves to examine the sealed material in Appellant's record of trial: Appellate Exhibits II-VII (contained in Vol. 3), Appellate Exhibit VIII's Attachment 3 (contained in Vol. 3), Appellate Exhibits XX, XXIV, XXV, LV (contained in Vol. 4); Defense Exhibits F, N-S, U, and AB (all contained in Vol. 2) and Defense Exhibits G and T (contained in Vol. 8); and verbatim transcript pages 40-90, 1312-1334, 1340-1374, 1381-1386, 1455-1457, 1571-1603, 1637-1638, 2045-2053. TSgt Folts also requests permission for undersigned counsel to transmit the sealed material to Ms. Terri Zimmermann, his civilian defense counsel. TSgt Folts' civilian defense counsel is located in Texas, and is unable to travel to view the sealed materials in person. The military judge, trial counsel, and defense counsel at trial reviewed these materials.

Pursuant to R.C.M. 1103A(b)(4)(B)(i), "materials presented or reviewed at trial and sealed . . . may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]" A review of the entire record is necessary because this Court is empowered by Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c), to grant relief based

on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(c), UCMJ, 10 U.S.C. §866, counsel must therefore examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id*. Therefore, both military and civilian appellate defense counsels' examination of sealed materials is reasonably necessary to fulfill their responsibilities in this case, since counsel cannot perform their duty of representation under Article 70, UCMJ, 10 U.S.C. §870, and fulfill their duty to provide effective assistance of counsel without first reviewing the complete record of trial.

Undersigned military appellate defense counsel moves for permission to transmit one copy of the sealed material to Ms. Zimmermann in the following manner: (1) scan the hardcopy sealed material; (2) email the scanned documents to undersigned counsel's .mil email address; (3) send the files, encrypted, to Ms. Zimmermann via DOD SAFE.

Counsel respectfully request that this Honorable Court grant this Motion.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40322 Special Panel

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 responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the exhibit listed in Appellant's motion, which was available to all parties at trial, so long as the United States can also review the sealed exhibit as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed material.

The United States does not oppose military defense counsel creating a single copy of the requested sealed materials for secured transmission to Mr. Zimmerman, via a secure, encrypted transmission system such as DoD SAFE.

WHEREFORE, the United States respectfully responds to Appellant's 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 18 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40322**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Douglas M. FOLTS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 14 September 2023, counsel for Appellant submitted a Motion to Examine Sealed Materials. Specifically, counsel seeks to examine Appellate Exhibits II–VII, Attachment 3 to Appellate Exhibit VIII, Appellate Exhibits XX, XXIV, XXV, LV, Defense Exhibits F–G, N–U, AB, and verbatim transcript pages 40–90, 1312–1334, 1340–1374, 1381–1386, 1455–1457, 1571–1603, 1637–1638, and 2045–2053. Counsel for Appellant also request permission to transmit the sealed material to Ms. Terri Zimmerman, Appellant's civilian defense counsel. Ms. Zimmerman is located in Texas. The Government does not oppose the motion as long as its counsel may also examine the sealed materials as necessary to respond to any assignments of error referencing those materials.

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

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 20th day of September, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials and to Transmit Sealed Materials to Appellant's civilian defense counsel is **GRANTED**.

Appellate defense counsel and appellate government counsel may view examine Appellate Exhibits II–VII, Attachment 3 to Appellate Exhibit VIII, Appellate Exhibits XX, XXIV, XXV, LV, Defense Exhibits F–G, N–U, AB, and verbatim transcript pages 40–90, 1312–1334, 1340–1374, 1381–1386, 1455–1457, 1571–1603, 1637–1638, and 2045–2053.

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

Appellant's counsel is permitted to scan a hard copy of the sealed materials and to transmit encrypted files containing the above-mentioned sealed materials to Ms. Terri Zimmerman via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Special Panel No. ACM 40322 12 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **21 November 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript to the Court, appellate defense counsel, and appellate government counsel not later than 13 June 2023. In the same 14 April 2023 order to produce a verbatim transcript, this Court ordered that the Appellant's brief be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, while noting requests for enlargements of time will be entertained should they be needed. From 14 April 2023 to 21 July 2023, the date Appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten prosecution exhibits, 40 defense exhibits, 66 appellate exhibits, and one court exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript produced by the Government is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Since the last enlargement of time, military appellate defense counsel transmitted the sealed materials to civilian appellate defense counsel in accordance with this Court's order, dated 20 September 2023.

Military appellate defense counsel is currently assigned thirteen cases; nine cases are pending initial AOEs before this Court and two cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Three cases have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The Government filed its Answer Brief on 20 September 2023. On 21 September 2023, the CAAF granted Appellant's

motion to extend time to file the Reply Brief, which is now due on 13 October 2023. Oral argument is anticipated to occur by the end of the year.

2. *United States v. Bak,* ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, two defense exhibits, nine appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel completed her review of the record, but, on 5 October 2023, filed a motion for leave to file motion for remand due to several errors and omitted attachments in the record of trial. This motion is pending.

3. *United States v. Baumgartner,* ACM 40413 – The trial transcript is 797 pages long and the record of trial is seven volumes consisting of six prosecution exhibits, 17 defense exhibits, 44 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has completed her review of the transcript, minus the sealed materials, and is reviewing the remaining portions of the record.

Civilian appellate defense counsel, Ms. Terri Zimmermann, was TSgt Folts' civilian defense counsel at trial and has been retained to represent TSgt Folts on appeal as well. Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. While Ms. Zimmermann has additional clients and pending matters, the ones listed below are more time-sensitive and will interfere with her ability to complete her review of the record in TSgt Folts' case, research the factual and legal issues, consult with military appellate defense counsel and TSgt Folts, and draft the brief. She has reviewed the record in her capacity as TSgt Folts' trial defense counsel, but she has not yet completed her review the official record.

1. Inspector General (IG) Investigation Response – Representing an active-duty Air Force Lieutenant Colonel commander and preparing a response to allegations substantiated in IG report due 18 October 2023.

2. U.S. Naval Academy Conduct Adjudication – Representing a midshipman regarding a conduct adjudication at Deputy Commandant level taking place on 20 October 2023.

3. *United States v. CW3 Geranen*, USCA Dkt. No. 23-0261/AR – This is an appeal for an Article 120, UCMJ, conviction, where the Supplement to the Petition for Grant of Review is due on 23 October 2023.

In addition to their caseloads, both appellate defense counsel have impending obligations and trainings that impact their ability to complete their review of the record and draft the AOE at this time. Military appellate defense counsel has two upcoming appellate advocacy trainings: (1) *Appellate Advocacy Training*, scheduled

and (2) *Appellate Judges Education Institute Summit*, scheduled from . Civilian appellate defense counsel is (1) preparing remarks to give at Post 77 and Unit 77 annual Girls and Boys State Luncheon, whereat she is an award recipient, ; (2) preparing materials for presentation on Veterans Treatment Courts for State Bar of Texas CLE, materials due 23 October 2023 ; and (3) preparing class materials for guest lecture

Through no fault of TSgt Folts, undersigned counsel have been unable complete their review of his case. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case and advise him regarding potential errors.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 12 October 2023.

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

16 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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 grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 16 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Special Panel No. ACM 40322 9 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **21 December 2023**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript, while also ordering that Appellant's brief shall be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, subject to requests for enlargements of time should they be needed. From 14 April 2023 to 21 July 2023, the date appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Military appellate defense counsel is currently assigned thirteen cases; ten cases are pending initial AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Five cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel is currently writing the Grant Brief, due 15 December 2023.

2. *In re HVZ*, USCA Dkt. No 23-0250/AF – Oral argument is scheduled for 5 December 2023. While working on *United States v. Wells*, counsel will be preparing to argue on behalf of the real party in interest.

3. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2023. While working on the cases below, counsel will be preparing for oral

argument in this case.

4. *United States v. Bak*, No. ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel has completed her review, and after handling her case priorities at the CAAF, will return to this AOE.

5. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has completed her review of the transcript, but has not yet completed her review of the remaining parts of the record.

Civilian appellate defense counsel, Ms. Terri Zimmermann, was TSgt Folts' civilian defense counsel at trial and has been retained to represent TSgt Folts on appeal as well. Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. While Ms. Zimmermann has additional clients and pending matters, the ones listed below are more time-sensitive and will interfere with her ability to complete her review of the record in TSgt Folts' case, research the factual and legal issues, consult with military appellate defense counsel and TSgt Folts, and draft the brief. She has reviewed the record in her capacity as TSgt Folts' trial defense counsel, but she has not yet completed her review the official record.

1. *United States v. DiFalco* – Pending court-martial where the accused and defense were just served the preferral package. An Article 32, UCMJ, preliminary hearing is set for 9-10 January 2024.

2. Four pending administrative separation proceedings in her capacity as Reserve Chief Defense Counsel of the Marine Corps. These cases are not yet scheduled, but are anticipated for December, and civilian appellate counsel is currently working them in preparation.

Civilian appellate defense counsel is also the Chair of the Veterans Assistance Committee of the Texas Criminal Defense Lawyers Association. The annual Veterans Justice Clinic

, but the agenda is due 14 November 2023, which she has been working.

Through no fault of TSgt Folts, undersigned counsel have been unable complete their review of his case. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case and advise him regarding potential errors.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 9 November 2023.

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

15 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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 grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 15 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Special Panel No. ACM 40322 12 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **20 January 2024**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 291 days have elapsed. On the date requested, 330 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript, while also ordering that Appellant's brief shall be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, subject to requests for enlargements of time should they be needed. From 14 April 2023 to 21 July 2023, the date appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Military appellate defense counsel is currently assigned sixteen cases; thirteen cases are pending initial AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Three cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel is currently finishing the Grant Brief and Joint Appendix, due 15 December 2023.

2. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2023. While working on the case below, counsel will be preparing for oral argument in this case.

3. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. This appellant is currently confined. Counsel has completed her review of the transcript, but has not yet completed her review of the remaining parts of the record.

Additionally, to forewarn the Court, military appellate defense counsel will be on leave

Civilian appellate defense counsel, Ms. Terri Zimmermann, was TSgt Folts' civilian defense counsel at trial and has been retained to represent TSgt Folts on appeal as well. Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. While Ms. Zimmermann has additional clients and pending matters, the ones listed below are more time-sensitive and will interfere with her ability to complete her review of the record in TSgt Folts' case, research the factual and legal issues, consult with military appellate defense counsel and TSgt Folts, and draft the brief. She has reviewed the record in her capacity as TSgt Folts' trial defense counsel, but she has not yet completed her review the official record.

1. *United States v. DiFalco* – Pending court-martial; on-going trial preparation and defense investigation.

2. *United States v. Cooley*, No. ACM 40376 – Reviewing the record.

3. *Texas v. Long*, Montgomery County, Texas – Robbery allegation; on-going trial preparation (initial appearance 13 December 2023).

4. *Texas v. Long*, Harris County, Texas – Aggravated assault allegation; on-going trial preparation (pretrial conference 1 February 2024).

Civilian appellate defense counsel is also preparing to teach a class, "Military Law for Civilian Attorneys,"

Through no fault of TSgt Folts, undersigned counsel have been unable complete their review of his case. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case and advise him regarding potential errors.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 12 December 2023.

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

13 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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 grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 13 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40322**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Douglas M. FOLTS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 12 December 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 14th day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **20 January 2024**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Special Panel
Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	)	No. ACM 40322
	)	9 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **19 February 2024**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 319 days have elapsed. On the date requested, 360 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript, while also ordering that Appellant's brief shall be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, subject to requests for enlargements of time should they be needed. From 14 April 2023 to 21 July 2023, the date appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Since the last request for an enlargement of time, civilian appellate defense counsel, Ms. Terri Zimmermann, has identified several appellate issues, including sufficiency of the evidence on two elements of the convicted offense and significant evidentiary issues, such as rulings on Military Rule of Evidence 412 matters. She has not drafted the issues or discussed them in detail with TSgt Folts yet because she wants to consult with military appellate defense counsel after Capt Castanien has conducted an independent review. As Ms. Zimmermann was trial defense counsel, both appellate counsel want to ensure independent reviews are conducted to protect TSgt Folts' rights on appeal.

Military appellate defense counsel is currently assigned fifteen cases; twelve cases are pending initial AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Three cases have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2024. Counsel is currently preparing for oral argument while working on the cases listed below.

2. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Undersigned counsel filed the Grant Brief on 15 December 2023. The Government's Answer Brief is due by 23 January 2024, as the CAAF approved the Government's request for additional time. Upon receipt of the Answer Brief, undersigned counsel will begin working on the Reply Brief.

3. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has completed her review of the transcript, but has not yet completed her review of the remaining parts of the record.

Additionally, to forewarn the Court, military appellate defense counsel will be out of the office

Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. She has several cases set for trial and several appeals pending at this Court, the Army Court of Criminal Appeals, and is waiting on a grant decision in one case from the Court of Appeals for the Armed Forces.

Through no fault of TSgt Folts, undersigned counsel have been unable complete their review of his case. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case and advise him regarding potential errors.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 9 January 2024.

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

11 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 11 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. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Special Panel No. ACM 40322 7 February 2024

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **20 March 2024**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 348 days have elapsed. On the date requested, 390 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript, while also ordering that Appellant's brief shall be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, subject to requests for enlargements of time should they be needed. From 14 April 2023 to 21 July 2023, the date appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate defense counsel, Ms. Terri Zimmermann, represents multiple clients, both at the trial and appellate levels. She has several cases set for trial and several appeals pending at this Court and the Army Court of Criminal Appeals. She prepared for and taught a class entitled, "Military Law for Civilian Attorneys"

; has been on orders to the annual USMC Defense Services Organization Worldwide training (she serves as the Reserve Chief Defense Counsel of the Marine Corps)

; and is scheduled to teach at the Air Force DART training

Since the last request for an enlargement of time, Ms. Zimmermann has begun drafting the several appellate issues she identified, including sufficiency of the evidence on two elements of the convicted offense and significant evidentiary issues, such as rulings on Military Rule of

Evidence 412 matters. She has discussed them broadly with military appellate defense counsel so she could begin drafting the AOE while military appellate defense counsel completes her two pending priorities before reviewing the record. As Ms. Zimmermann was trial defense counsel, both appellate defense counsel still want to ensure independent reviews are conducted to protect TSgt Folts' rights on appeal.

Military appellate defense counsel is currently assigned sixteen cases; thirteen cases are pending initial AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Two cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Undersigned counsel is drafting the Reply Brief, due 9 February 2024. Oral argument is scheduled for 6 March 2024.

2. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has completed her review of the transcript, and outlined one assignment of error, but has not yet completed her review of the remaining parts of the record.

Through no fault of TSgt Folts, military appellate defense counsel has been unable to complete her review of his case, and, overall, both undersigned counsel have not been able to complete his AOE brief yet. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case, advise him regarding potential errors, and finalize his AOE brief.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 7 February 2024.

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

8 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	))))))))))	UNITED STATES' OPPOSTION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant more than a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's more than a year long delay practically ensures this Court will not be able issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel on the case has not completed review of the record of trial at this late stage of the appellate process.

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

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 8 February 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. Technical Sergeant (E-6), **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)** Before Special Panel No. ACM 40322 12 March 2024

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **19 April 2024**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 382 days have elapsed. On the date requested, 420 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript, while also ordering that Appellant's brief shall be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, subject to requests for enlargements of time should they be needed. From 14 April 2023 to 21 July 2023, the date appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate defense counsel, Ms. Terri Zimmermann, represents multiple clients, both at the trial and appellate levels. She has several cases set for trial and several appeals pending at this Court and the Army Court of Criminal Appeals. She presented at the Air Force DART training ; is scheduled to be at Nellis Air Force Base (AFB) to investigate and prepare for a court-martial of an active duty Lieutenant Colonel charged with multiple violations of the UCMJ; and has other time-sensitive case obligations listed below that she is balancing while drafting TSgt Folts' AOE:

1. *United States v. Knodel*, No. ACM 40018: On 8 March 2024, this Court affirmed the findings and the sentence. Capt Knodel is currently confined at the Naval Consolidated Brig in Miramar, California. Counsel needs to coordinate with military appellate defense counsel,

consult with the client, and determine whether grounds exist to request reconsideration and/or a Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF). All of this must be done relatively quickly to preserve Capt Knodel's rights.

2. *United States v. Lt Col DiFalco*: pending Air Force court-martial with a total of six charges (Articles 120b, 134, 133, 120, 120c, 131b) and 17 specifications to begin at Nellis AFB on 8 July 2024 with motions due in March 2024.

3. *State of Texas v. Melendez*: probation revocation hearing; client is jailed in New York awaiting extradition to Montgomery County, Texas. Current time-sensitive tasks include ensuring the State correctly follows extradition procedures and analyzing evidence pertinent to probation violation allegations to prevent revocation and prison sentence.

4. *United States v. Gude*: pending Board of Inquiry set for 3 April 2024 for an Army 1LT being accused of sexually assaulting three female officers.

5. *United States v. 1LT Badders* (ARMY 20200538): Article 120 appeal awaiting a ruling from the Army Court of Criminal Appeals on a Motion for Oral Argument.

Ms. Zimmermann also has a pending case at the Army Court of Criminal Appeals, *United States v. Monroe* (ACM 20220122) (8 charges and 23 specifications of conviction of various Articles); a robbery case, *State of Texas v. Long*, set for hearing on 29 May 2024; an aggravated assault and felony assault of a family member case, *State of Texas v. Long*, set for trial beginning 5 September 2024 in Harris County, Texas; and a pending Army Court of Criminal Appeals case, *United States v. Ingram*.

Since the last request for an enlargement of time, Ms. Zimmermann has continued to draft the several appellate issues she identified, including sufficiency of the evidence on two elements of the convicted offense and significant evidentiary issues, such as rulings on Military Rule of

Evidence 412 matters. However, Ms. Zimmermann has not finalized the brief as she is waiting for military appellate defense counsel's review. As Ms. Zimmermann was also trial defense counsel, both appellate defense counsel want to ensure independent reviews are conducted to protect TSgt Folts' rights on appeal, to include any possible ineffective assistance of counsel claims. In this unique situation, both appellate defense counsel are working diligently to balance their priorities while advancing TSgt Folts' case on appeal. TSgt Folts has been advised of this dynamic and the management of his case.

Military appellate defense counsel is currently assigned seventeen cases; fourteen cases are pending initial AOEs before this Court and three cases are pending before the CAAF. Only one case has priority over the present case: *United States v. Baumgartner*, No. ACM 40413. Military appellate defense counsel has reviewed all the sealed materials for that appellant's case, the prosecution and defense exhibits, pre-trial and post-trial processing, and is currently reviewing the remaining appellate exhibits. She previously reviewed the transcript for an appellate advocacy training in October 2023. She has identified several assignments of error, to include legal and factual sufficiency for both charges, and has started outlining them as she finishes her review.

Since TSgt Folts' last request for an enlargement of time, military appellate defense counsel filed a 28-page reply brief for *United States v. Wells*, USCA Dkt. No. 23-0219/AF, which was submitted on 9 February 2024. She then argued *United States v. Wells*, USCA Dkt. No. 23-0219/AF at the CAAF on 6 March 2024 after participating in three moot arguments. Military appellate defense counsel also reviewed a 78-page draft AOE for *United States v. Braum*, No. ACM 40434, which civilian counsel ultimately submitted on 10 February 2024 in accordance with that appellant's request for speedy appellate review. Finally, military appellate defense

counsel also reviewed the minimal rehearing documents in *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev), a case she inherited from previous appellate defense counsel, to assess the nature of any new AOE. Review has triggered the need to read the transcript (362 pages) for a possible AOE, which has moved the case up undersigned counsel's priority list, but still below TSgt Folts' case.

To alert the Court, military appellate defense counsel has leave

Additionally, while both appellate defense counsel anticipate this will be the last enlargement of time request, due to military appellate defense counsel's other case, her impending leave, and the possibility that upon independent review, additional assignments of error may need to be briefed, one final, but shorter, enlargement may be requested.

Through no fault of TSgt Folts, military appellate defense counsel has been unable to complete her review of his case, and, overall, both undersigned counsel have not been able to complete his AOE brief yet. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case, advise him regarding potential errors, and finalize his AOE brief.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 Air Force Government Trial and Appellate Operations on 12 March 2024.

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

12 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	))))))))))	UNITED STATES' OPPOSTION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant more than a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's more than a year long delay practically ensures this Court will not be able 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 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 12 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)** Before Special Panel No. ACM 40322 10 April 2024

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas Folts hereby moves for an enlargement of time to file an Assignments of Error (AOE) brief. TSgt Folts requests an enlargement for a period of 30 days, which will end on **19 May 2024**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 411 days have elapsed. On the date requested, 450 days will have elapsed. Undersigned counsel expect this to be the last request for an extension of time, barring any extraordinary circumstances.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 14 April 2023, this Court ordered the Government to produce a verbatim transcript, while also ordering that Appellant's brief shall be submitted in accordance with the timeline established in Rule 18 of this Court's Rules of Practice and Procedure, subject to requests for enlargements of time should they be needed. From 14 April 2023 to 21 July 2023, the date appellate defense counsel received the verbatim transcript from the Government, 98 days passed.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate defense counsel, Ms. Terri Zimmermann, represents multiple clients, both at the trial and appellate levels. She has several cases set for trial and several appeals pending at this Court and the Army Court of Criminal Appeals. She has a heavy motions hearing at Nellis Air Force Base (AFB) (Mil. R. Evid 412 and 513, compelling witness production and discovery) along with other time-sensitive case obligations listed below that she is balancing while drafting TSgt Folts' AOE:

1. *United States v. Knodel*, No. ACM 40018: Working on a Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF), due 7 May 2024.

2. *United States v. Lt Col DiFalco*: pending Air Force court-martial with a total of six charges (Articles 120b, 134, 133, 120, 120c, 131b) and 17 specifications to begin at Nellis AFB on 8 July 2024. The first motions hearing is set for , and there will likely be a

second round of motions since the Air Force Office of Special Investigations still has not produced a Report of Investigation and discovery is far from complete.

3. *State of Texas v. Melendez*: probation revocation hearing in Montgomery County, Texas, set for 17 May 2024.

4. *United States v. 1LT Badders* (ARMY 20200538): Article 120 appeal awaiting a ruling from the Army Court of Criminal Appeals on a Motion for Oral Argument.

Ms. Zimmermann also has a pending case at the Army Court of Criminal Appeals, *United States v. Monroe* (ACM 20220122) (8 charges and 23 specifications of various Articles); a robbery case, *State of Texas v. Long*, set for hearing in Montgomery County, Texas, on 29 May 2024; an aggravated assault and felony assault of a family member case, *State of Texas v. Long*, set for trial beginning 5 September 2024 in Harris County, Texas; and a pending Army Court of Criminal Appeals case, *United States v. Ingram*.

Since the last request for an enlargement of time, Ms. Zimmermann has continued to draft the several appellate issues she identified, including sufficiency of the evidence on two elements of the convicted offense and significant evidentiary issues, such as rulings on Military Rule of Evidence 412 matters. However, Ms. Zimmermann has not finalized the brief as she is waiting for military appellate defense counsel's review. As Ms. Zimmermann was also trial defense counsel, both appellate defense counsel want to ensure independent reviews are conducted to protect TSgt Folts' rights on appeal, to include any possible ineffective assistance of counsel claims. In this unique situation, both appellate defense counsel are working diligently to balance their priorities while advancing TSgt Folts' case on appeal. TSgt Folts has been advised of this dynamic and the management of his case.

Military appellate defense counsel is currently assigned eighteen cases; fifteen cases are pending initial AOEs before this Court and three cases are pending before the CAAF. Two cases have priority over the present case:

1. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Undersigned counsel has reviewed the record and is drafting the AOE, which currently consists of six issues, to include legal and factual sufficiency for both charges. This appellant's civilian appellate defense counsel is currently working another issue regarding ineffective assistance of counsel. Barring extraordinary circumstances, this AOE will be submitted early May. Undersigned military appellate defense counsel anticipates her portion of the draft AOE will be completed over the next two weeks, whereupon she intends to review TSgt Folts' record.

2. *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev) – On 19 March 2024, this Court held a status conference discussing the procedural posture of this case. On 20 March 2024, the Court issued an order wherein any assignments of error would be filed by 24 April 2024, and, absent extraordinary circumstances, no further requests for an enlargement of time would be granted. As a result of this order, this appellant's case, docketed with the Court on 27 October 2023, has increased in priority over TSgt Folts'. Undersigned military appellate defense counsel is currently drafting the AOE prompted by the error found in the rehearing related documents. As this appellant's AOE is due by 24 April 2024, undersigned military appellate defense counsel does not anticipate this appellant's case substantially interfering with the review

of TSgt Folts' record, but she has to balance it with completing the AOE for *United States v. Baumgartner*, No. ACM 40413, over the next several weeks.

Since TSgt Folts' last request for an enlargement of time, military appellate defense finished reading both records of trial[3] that are prioritized over TSgt Folts' and is drafting both AOEs. She continues to work both AOE drafts so as to start review of TSgt Folts' record as soon as possible.

. She will be unable to work on Appellant's case, or any other case, during this time. Undersigned counsel both anticipate that if given a 30-day extension until 19 May 2024, counsel will be able to submit TSgt Folts' AOE without issue, even considering undersigned military appellate defense counsel's leave, absent any extraordinary circumstances.

Through no fault of TSgt Folts, military appellate defense counsel has been unable to complete her review of his case, and, overall, both undersigned counsel have not been able to complete his AOE brief yet. An enlargement of time is necessary to allow counsel to fully review TSgt Folts' case, advise him regarding potential errors, and finalize his AOE brief.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

[3] Undersigned military appellate defense counsel was not the original appellate defense counsel assigned to *United States v. Dominguez-Garcia*, No. ACM S32694, and she was required to read the complete record for the new AOE that arose on further review and as a part of her Article 70, UCMJ, obligations overall.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

TERRI R. ZIMMERMANN
Civilian Appellate Defense Counsel
Zimmermann & Zimmermann, PLLC

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 Air Force Government Trial and Appellate Operations on 10 April 2024.

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

11 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant.*	))))))))))	UNITED STATES' OPPOSTION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40322 Special Panel

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 more than 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 450 days in length. Appellant's more than a year long delay practically ensures this Court will not be able 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 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 11 April 2024.

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

No. ACM 40322

IN THE
UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

TECHNICAL SERGEANT (E-6)
DOUGLAS M. FOLTS,
U.S. Air Force,
Appellant

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force, *Appellant.*	**BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40322 Filed on: 16 May 2024

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

Assignments of Error

I.
THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THE LANGUAGE COMMUNICATED (THE MEMES) WAS INDECENT – SYNONYMOUS WITH OBSCENE – OR COMMUNICATED WITH CRIMINAL INTENT.

II.
TSGT FOLTS DID NOT HAVE FAIR NOTICE THAT SENDING THE THREE MEMES CONSTITUTED SEXUAL ABUSE OF A CHILD.

III.
AS APPLIED TO TSGT FOLTS, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

Statement of the Case

On 26 February 2022, contrary to his pleas, a panel of officer and enlisted members sitting as a general court-martial at Eielson Air Force Base, Alaska, convicted the Appellant, Technical Sergeant Douglas Folts, of one charge and one specification of sexual abuse of a child by

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022).

communicating indecent language in violation of Article 120b, Uniform Code of Military Justice (UCMJ), *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).[2] R. at 2014. The members acquitted TSgt Folts of two specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 2014. On 27 February 2022, the military judge sentenced TSgt Folts to forfeit $3000.00 per month for six months and to be confined for 16 days. R. at 2140. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

On 6 July 2022, Article 65(d), UCMJ, review was completed in TSgt Folts' case. TSgt Folts had not yet submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ, at the time he submitted a notice of direct appeal to this Court on 22 February 2023. This Court docketed TSgt Folts' case on 24 February 2023 as a direct appeal pursuant to Article 66(b)(1)(A), UCMJ.

General Statement of Facts

TSgt Folts previously was married and had one child with his first wife. R. at 1176. Meanwhile, C F previously was married to D M and they had two children, OM and her younger brother. R. at 1173. In approximately 2014, both couples divorced their respective spouses and TSgt Folts married C . R. at 1174-75. M later married J . R. at 1174.

M M and C had a custody arrangement whereby the two kids would spend three school years with one parent and then the next three years with the other parent. R. at 1608-

[2] All references to the punitive articles, Rules for Court-Martial, and Military Rules of Evidence are to the 2019 *MCM*, unless otherwise noted.

09. The kids spent the summer and winter school breaks with whichever parent they were not living with at the time. R. at 1609. In 2020, the kids were living with their father, who was an active duty Air Force member stationed at Ramstein Air Base, Germany. R. at 1172. Pursuant to the agreement, the children visited their mother and TSgt Folts in Alaska during the summer 2020 vacation for approximately a month. R. at 1181-82. At that time, OM was 14 years old. R. at 1172. The children were due to switch to living with C during the summer of 2021, after OM's freshman year of high school. R. at 1622.

TSgt Folts had a strong relationship with his stepdaughter, OM. At trial, OM described her feelings toward him: "We were really close. I'd go to him for really anything. I felt comfortable with him. I feel like I honestly had a better relationship with him than I did with my own mom." R. at 1181; *see also* R. at 1402. In fact, OM often confided in TSgt Folts more than or before she confided in her mother. R. at 1408. These conversations often involved sexually-related topics such as masturbation, vibrators, and her sexual orientation. R. at 1401, 1409, 1715-16. OM agreed TSgt Folts was a good stepfather and she often sought his advice. R. at 1403. TSgt Folts was very supportive of OM's exploration of her sexuality and told her to "be happy with who [she was]." R. at 1401.

When OM was in Germany, she spoke to her mother and TSgt Folts, usually by FaceTime, every Sunday; if TSgt Folts was not initially on the call, she would ask to speak to him. R. at 1403. She also communicated with TSgt Folts using messaging programs such as WhatsApp[3] or Skype.[4] R. at 1396, 1426. When using Skype, OM used her father's account. R. at 1644.

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[3] WhatsApp is a program that allows users to send text messages to each other.

[4] Skype is a video teleconferencing software that allows users to place phone and video calls and send messages to each other.

OM told TSgt Folts about a phone application called ifunny.com that contained humorous memes,[5] and they frequently looked at the memes together. R. at 1395-96. They also exchanged memes via Skype, and it was OM's understanding TSgt Folts sent memes he thought she would find funny, just as she probably sent memes to him that she thought were entertaining. R. at 1397. She never complained to her parents or anyone else about any allegedly inappropriate or offensive message she received from TSgt Folts, including memes he sent to her. R. at 1398, 1642.

Evidence indicated TSgt Folts sent the memes at issue in March 2020. Pros. Ex. 6. The memes depict:

> (1) a fully-clothed woman with large breasts going through an airport security checkpoint, with a caption saying, "we're gonna have to perform a cavity search";
>
> (2) images of a man holding up one finger, a man holding up two fingers, and a man with an amputated lower arm, with corresponding photos of a woman apparently experiencing sexual pleasure, with the caption, "Different levels of adult pleasure funny adult meme"; and
>
> (3) the cartoon character Piglet superimposed on what appears to be a vagina or clitoris with the caption, "Wherever you see Piglet, you know Pooh is only a few inches away."

Pros. Ex. 6.

The memes do not depict any sexual act, any act of sexual violence or nonconsensual behavior, any children posing nude or in a sexually suggestive way, or any sexual conduct between adults and children, whatsoever. There was no text communication from TSgt Folts either before or after the memes (such as, for example, "I want to see you like this," "I want to try this with you," "doesn't this look cool," etc.). Pros. Ex. 5.

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[5] A meme is "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." https://www.merriam-webster.com/dictionary/meme; *see also* Alexis Benveniste, The Meaning and History of Memes, The New York Times, https://www.nytimes.com/2022/01/26/crosswords/what-is-a-meme.html (26 Jan. 2022) ("Memes are basically editorial cartoons for the internet age . . . .").

In October 2020, TSgt Folts and C had an argument with OM which precipitated her claiming TSgt Folts touched her inner thigh and made comments to her that were inappropriate during the July 2020 visit; TSgt Folts was charged with and acquitted of this conduct. R. at 2014. However, it is important to note that it was only after OM made these other allegations to her father that M reported the memes at issue to the Air Force Office of Special Investigations (AFOSI), even though he saw the messages "shortly after they were sent." R. at 1643. During her interview with AFOSI, OM confirmed there was "nothing weird" about her relationship with TSgt Folts before the July 2020 visit. R. at 1403.

Several people who knew TSgt Folts well testified to his good character; specifically, that he is a good father. R. at 1816, 1826, 1833.

Both the Statement of Trial Results (STR) and Entry of Judgment (EOJ) contain the following notation: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes" despite the lack of violence involved in the convicted offense. ROT, Vol. 1, *Entry of Judgment in the Case of United States v. TSgt Douglas M. Folts* (EOJ), dated 27 February 2022.

Summary of Argument

I. THE EVIDENCE WAS INSUFFICIENT

The memes at issue are arguably in poor taste, but they do not meet the legal definition of "indecent." There was insufficient evidence to prove the memes were indecent and therefore unlawful. His speech was otherwise protected under the First Amendment and his conviction cannot stand.

Further, TSgt Folts sent the memes to OM with the intent to be funny, not with any criminal state of mind, including the charged intent to gratify his sexual desire. There was insufficient

evidence to prove he had a criminal state of mind when he sent the Skype message that contained the memes.

II. TSGT FOLTS DID NOT HAVE FAIR NOTICE THAT SENDING THE THREE MEMES CONSTITUTED SEXUAL ABUSE OF A CHILD

The memes in question do not depict any child pornography, any sexual act, any act of sexual violence or nonconsensual behavior, any children posing nude or in a sexually suggestive way, or any sexual conduct between adults and children, whatsoever. There was no text communication from TSgt Folts either before or after the memes expressing a sexual interest in OM. TSgt Folts was not on notice that his conduct violated the law. The conviction resulted from a due process violation that constitutes plain error.

III. TSGT FOLTS SHOULD NOT BE PERMANENTLY BARRED FROM POSSESSING A FIREARM

The Supreme Court's recent jurisprudence in *Bruen* has changed the Government's ability to categorically bar every person convicted of a felony from *ever* owning a firearm. The Government must show history and tradition supports barring TSgt Folts from ever owning a firearm, and it cannot do so because he was not convicted of a violent offense. This Court can amend the STR and EOJ to properly reflect the findings in this court-martial.

Argument

I.
THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THE LANGUAGE COMMUNICATED (THE MEMES) WAS INDECENT – SYNONYMOUS WITH OBSCENE – OR COMMUNICATED WITH CRIMINAL INTENT.

A. Standard of Review.

This Court reviews legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This Court may only affirm findings it determines are "correct in law and fact[.]" Article 66(d), UCMJ.

"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) (citation omitted).

Factual sufficiency requires this Court to determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of [the Court] are themselves convinced of the accused's guilt beyond a reasonable doubt*." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citation omitted). A review for factual sufficiency "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Washington*, 57 M.J. at 399. "In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, our unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016)

(unpub. op.). This authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). Finally, this Court has the tremendous power to judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the fact finder. *United States v. Col*e, 31 M.J. 270, 272 (C.M.A. 1990) (citation omitted).

The constitutionality of an act of Congress is a question of law reviewed de novo. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). For an "as applied" constitutional challenge, this Court conducts a fact-specific inquiry. *Id*. (citations omitted).

B. "Indecent Language" is a Term of Art Equivalent to Obscenity.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Court of Appeals for the Armed Forces (CAAF) held almost a quarter of a century ago: "When the Government makes speech a crime, the judges on appeal must use an exacting ruler." *United States v. Brinson*, 49 M.J. 360, 361 (C.A.A.F. 1998). However, it is well-settled law that obscenity is not speech protected by the First Amendment, regardless of the military or civilian status of the speaker. *United States v. Williams*, 553 U.S. 285, 288 (2008); *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008).

> The basic guidelines for judging whether material is obscene are:
>
> (1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,
>
> (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973).

The *MCM* itself does not define what "indecent language" is for purposes of the offense of conviction. *United States v. Avery*, 79 M.J. 363, 368 (C.A.A.F. 2020). However, other parts of the *MCM* define "indecent" consistently under two distinct definitions:

> (1) grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature; or
>
> (2) grossly offensive because of its tendency to incite lustful thought.

United States v. Green, 68 M.J. 266, 269 (C.A.A.F. 2010); *United States v. Negron*, 60 M.J. 136, 144 (C.A.A.F. 2004). The first definition "tends reasonably to corrupt morals" while the second reasonably tends to "incite libidinous thoughts." *Id*. Both definitions require the language to violate community standards. *Green*, 68 M.J. at 269.

When the "same word" is used in related places within the *MCM*, it generally is given "the same meaning and effect." *United States v. Brown,* 84 M.J. 124, 129 (C.A.A.F. 2024) (citing *Azar v. Allina Health Servs*., 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes.")). The word "indecency" or one of its derivatives appears several times in the *MCM*.[6]

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[6] *See, e.g.*:
Article 120a (Mails: Deposit of Obscene Matter): Whether something is obscene is a question of fact. Obscene is synonymous with indecent as the latter is defined in subparagraph 104.c. The matter must *violate community standards of decency or obscenity* and must go beyond customary limits of expression.
Article 120c (Indecent Exposure): The term "indecent manner" means conduct that amounts to a *form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.*
Article 134 (Indecent Conduct): "Indecent" means that *form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations*.
Article 134 (Indecent Language): Indecent language is that which is *grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature*, *or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts*. The language must violate community standards.

While the definitions vary slightly, they all include common themes such as requiring a "gross" level of vulgarity or obscenity and a violation of community standards; it is clear that Congress and the President intended for "indecent" language or conduct that violates the law to be more than "inappropriate" or "distasteful." In fact, the courts have repeatedly held, "'indecent' is synonymous with obscene." *United States v. Knarr*, 80 M.J. 522, 532 (A.F. Ct. Crim. App. 2020) (quoting *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019), additional citations omitted). This reference to "obscene" is not to the dictionary definition of "obscene," but the unprotected speech category of obscenity.

"Indecent" being synonymous with "obscenity" is apparent when looking at the definition for "indecent language" remaining under Article 120b(c), UCMJ, after *Avery.* When assessing the drafter's intent for Article 120b(c), UCMJ, the CAAF determined Article 120b(c), UCMJ, criminalizes "indecent language that constitutes a 'lewd act'—that is, a 'sexually unchaste or licentious' act." *Avery*, 79 M.J. at 369. Article 120b(c), UCMJ, does not criminalize *all* indecent language, like Article 134, UCMJ, can, but only the *second* definition of "indecent language," that which is grossly offensive because it is sexual. This means the definition of "indecent language" under Article 120b(c) is clear and simple: in applying community standards, language that is grossly offensive because of its tendency to incite lustful thought. *Avery,* 79 M.J. at 369. This is just another way of saying obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth v. United States*, 354 U.S. 476, 489 (1957). Therefore, Article 120b(c), UCMJ, regulates an unprotected category of speech[7]; if it does not, then the test from *Wilcox* applies.

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[7] As applied, no other category of unprotected speech covers the language at issue. *See Counterman v. Colorado*, 143 S. Ct. 2106, 2113-2114 (2023) (discussing a number of the

C. When the Government Regulates Protected Speech in the Military, the *Wilcox* Test Applies.

A law that regulates speech based on its content, when that content is not obscene or does not fall within another category of unprotected speech, must pass the strict scrutiny test. *Reed v. Town of Gilbert,* 576 U.S. 155, 163-164 (2015). Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id*. at 171 (quotations and citations omitted). While never explicitly stated, military appellate courts have long been applying a strict scrutiny analysis when assessing "whether the gravity of the effect of accused's [speech] on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction." *United States v. Priest*, 21 C.M.A. 564, 570-71 (C.M.A. 1972). This is a focus on the "essential needs of the armed services," or the compelling Government interest present in the regulation of military members' speech. This evaluation and framework are best seen in *United States v. Wilcox.*

In *Wilcox*, the Court laid out a three-part assessment, starting with whether the speech is categorically unprotected, like obscenity. *Wilcox*, 66 M.J. at 447. If it is not, *i.e.*, if it is protected, then the Court assesses whether there is a connection between the speech and the military mission.[8]

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unprotected speech categories). Soliciting a child to engage in sexual acts would not be protected speech (either because it is obscenity or because it is speech used in furtherance of a crime), but that is not at issue here.

[8] While not explicit in the *Wilcox* decision, this factor may concern only whether the elements of an offense are met (in *Wilcox*, an Article 134, UCMJ, offense) rather than looking to whether there is a link between the speech and the mission. *See Wilcox*, 66 M.J. at 448-49; *see also United States v. Raper*, 75 M.J. 164, 170-71 (C.A.A.F. 2016) (applying the three-factor test to another Article 134, UCMJ, case); *cf. Standage v. Brathwaite*, 526 F. Supp. 3d 56, 82 (D. Md. 2020) ("Next the court determines whether the elements of the offense were satisfied."). However, this makes little sense. The canon of constitutional avoidance dictates that courts should avoid resolving constitutional questions if the case can be resolved in another manner. *Rescue Army v.*

Id. at 448-449. If there is a connection, then a balancing test occurs, which is comparable to the strict scrutiny analysis of whether the government's interest is narrowly tailored to achieve that interest. *Id.* at 449-50. When speech is both protected and does not have a connection to the military mission, *i.e.*, there is no compelling government interest, then the criminal prosecution is barred by the First Amendment. *Id.* at 449-50.

The *Wilcox* test is not limited to Article 134, UCMJ, offenses. When developing Article 117a, UCMJ, the Committee on the Armed Services Committee received a letter from the U.S. Department of Justice highlighting constitutional concerns with Article 117a, UCMJ, if there was no military nexus: "To avoid First Amendment concerns, we recommend limiting section 523 to the distribution of visual images with 'a reasonably direct and palpable connection' to 'the military mission or military environment.' *Wilcox*, 66 M.J. at 449." Department of Justice, *Letter re: H.R. 2810, National Defense Authorization FY18* at 12 (Nov. 8, 2017).[9] The invocation of *Wilcox* outside of an Article 134, UCMJ, context highlights that the Government has a unique interest in regulating its member's speech, but only one that is compelling when it directly and palpably affects the military mission. Congress ultimately included the recommended language, adding a final element to the statute. Article 117a, UCMJ.

D. The Memes Are Protected Speech.

The memes TSgt Folts sent to OM are constitutionally protected speech for two reasons. First, the memes TSgt Folts sent do not meet the definition of obscenity. Second, there is no nexus between the regulated speech and the military mission or good order and discipline.

Mun. Ct. of Los Angeles, 331 U.S. 549, 568 (1947). If the Government fails to prove the elements of the offense, then courts should ordinarily resolve the case without addressing the constitutional question. *Wilcox*, 66 M.J. at 452 (Baker, J., dissenting).

[9] Available here: https://www.justice.gov/ola/page/file/1010586/dl?inline.

All three memes are quite obviously sex jokes. Two of the three memes even include explicit, textual references to humor: "funny adult meme" and "humorhub." Pros. Ex. 6 at 2-3. While they relate to sex, none of the memes appeal to the prurient interest as they do not portray sexual conduct in a patently or grossly offensive way or incite sexual interest. *See Miller*, 413 U.S. at 24. One meme, the one purportedly showing a vagina, does not even portray or suggest sexual conduct. Pros. Ex. 6 at 3. Instead, the meme appears to make a joke about the proximity between the clitoris and anus. *Id*. The other two memes are conventional sexual jokes, the first about the airport security agent's sexual attraction to a woman with large breasts and the second being an absurd suggestion that the amputated stump of an arm could fit in a vagina and cause sexual pleasure. These are not grossly offensive to the average person applying contemporary community standards. The mere description of these memes shows their ridiculousness and lack of intent to sexually arouse the reader or viewer. As they do not fall within the definition of obscenity, they are protected speech under the First Amendment.

Protected speech curtailed by the Government must pass strict scrutiny. The third *Wilcox* factor is a strict scrutiny analysis. This Court should apply that framework here, considering *Wilcox* is not limited to Article 134, UCMJ, and even if it is, the definition of indecent language is derived from Article 134, UCMJ. Nothing else about the definition has changed, only the limitation that Article 120b(c), UCMJ, covers sexual language and not "corrupting" language.

In moving through the *Wilcox* framework, TSgt Folts' speech has no connection to the military mission, which would be the compelling state interest at issue. There is no evidence or indication of any military nexus to sending these memes to OM. Therefore, Article 120b, UCMJ, cannot be constitutionally applied to criminalize TSgt Folts' language.

E. The Memes May Have Been Inappropriate, but They Were Not "Indecent."

Even if this Court disagrees that "indecent language" is not equivalent to "obscenity," the memes are still not "indecent language" under the plain language of the statute. Controlling case law makes it clear that "context matters." *Avery*, 79 M.J. at 369; *see also, Brinson*, 49 M.J. at 364 ("[W]e must examine the entire record of trial to determine the precise circumstances under which the charged language was communicated" to determine "whether language was intended to corrupt morals or excite libidinous thoughts") (citations omitted); *see also Schenck v. United States*, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends upon the circumstances in which it is done."). In *Brinson*, the accused directed a slew of profanities and racial epithets at military law enforcement officers who were attempting to arrest him. The Court found, "In these circumstances, appellant's use of coarse language was clearly calculated or intended to express his rage, not any sexual desire or moral dissolution." *Brinson*, 49 M.J. at 364. Therefore, the language was not "indecent" under Article 134. *Id.*

As mentioned, the memes at issue depicted a fully clothed woman who had large breasts, sexual innuendo about digital penetration,[10] and what appears to be a vagina with a reference to bodily functions. However, the text associated with the memes clearly uses the images to convey humor, and was not "*grossly* vulgar, *obscene*, and repugnant to common propriety, *and tends to excite sexual desire or deprave morals with respect to sexual relations*" as required by the relevant provision of the *MCM*. Article 120b, UCMJ (emphasis added). Also as mentioned, TSgt Folts did not send the memes to OM with any notation indicating a connection to or between the images and his relationship with OM – for example, "I would like to search *your* body cavities," or "let's

[10] OM described the image as referring to a woman "being fingered." R. at 1237.

try out *this* digital penetration," or "I'd like to go where Piglet goes" – or anything at all. There is absolutely no expression of any sexual interest in OM. If he had done that, there would be a much stronger argument that the communication constituted a lewd act. Instead, TSgt Folts sent mature images from ifunny.com (which they had viewed together and exchanged in the past) or similar sources that attempt to be humorous to his teenage stepdaughter, with whom he shared a close relationship. What some might consider poor judgment does not equate to criminal conduct.

Additionally, although "indecent" was a question for the members to decide, evidence of how the recipient of the communications – OM – viewed them certainly is relevant.[11] In this regard—recalling the Skype conversation was between TSgt Folts and OM *using her father's Skype account* – neither OM nor M found the memes offensive enough to report them to anyone until *after* OM made allegations of improper touching. Whether M himself an active duty member of the Air Force, found the memes "grossly vulgar, obscene, and repugnant to common propriety" was relevant to the members' determination whether the language was indecent. None of the language in the charged memes that TSgt Folts messaged to OM was indecent.

F. TSgt Folts Sent the Memes with the Intent to Be Funny, Not to Gratify His Sexual Desire.

Regardless of whether other people who view the memes at issue find them funny or distasteful (which goes to the "indecent language" element), the fact remains OM thought TSgt Folts sent them to her in jest and all the circumstantial evidence points to these memes being a

[11] There was a plethora of other evidence regarding the family culture of joking about sexually-related topics; the military judge sustained a Government objection to the evidence and denied Appellate Exhibit LV, the Defense request to admit the evidence. R. at 1385-86. While arguably erroneous, TSgt Folts explicitly ***waives*** his right to raise this issue on appeal.

joke as well (going to the intent element). She testified she liked to joke around with him. R. at 1405. The use of humor in their relationship is well documented – OM described the birthday card she sent to him just before the July 2020 trip as joking about him being old and her not being pregnant. R. at 1405. Also, photos from the trip show OM and TSgt Folts sitting on the couch together playing video games, and TSgt Folts has bunny ears on his head to be silly. Def. Ex. J; R. at 1416-17. The following exchange from OM's trial testimony is significant:

> Q. And he sent you memes too, right?
>
> A. Yes.
>
> Q. And I think you testified yesterday you didn't find all of them very humorous; but, *it was your understanding that he was trying to be funny, right?*
>
> A. *Yes*.
>
> Q. And none of the memes had any kind accompanying text that said something like, hey, let's do this, or anything like that right?
>
> A. No.
>
> Q. Okay. *It was all just the meme itself to make you laugh?*
>
> A. *Yes*.

R. at 1397 (emphasis added). OM, who knew TSgt Folts well and had a close ongoing stepfather-stepdaughter relationship with him and a track record of exchanging humorous memes, had the firm opinion that TSgt Folts was just trying to be funny.

Like with "indecent," the issue of intent was a question for the members. However, again, how OM viewed the messages was relevant for evaluating intent. Neither OM nor her father considered the messages as anything other than normal communications between OM and TSgt Folts. Whether M or OM thought the memes were sent to "gratify his sexual desire" was relevant to this consideration—and neither of them did think that.

The CAAF fairly recently considered the issue of indecency in the context of communications with a minor, and the complainant's testimony on the purpose of the conversation as issue was prominent in its opinion. *Avery*, 79 M.J. at 369. In that case, the accused was convicted of indecent language in violation of Article 134, UCMJ. He "engaged in a name-calling duel" via instant messaging with a girl who babysat his children; "During this session, [A]ppellant called the twelve year-old girl a 'cum guzzling gutter slut.'" *Id.* at 365 (citation omitted).

The Court addressed Specialist Avery's preemption argument by tracing the history of military indecent language statutes. Ultimately, the Court found the only differences between Article 120b, UCMJ, and Article 134, UCMJ, are:

1. Article 120b requires a specific intent – in this case, to gratify TSgt Folts' sexual desire; and

2. Language can be punishable by Article 134, UCMJ even if it is not sexual.

Id. at 368.

Holding Congress did not intend Article 120b, UCMJ, to preempt Article 134, UCMJ, except when the language communicated is sexual and directed to a child, the Court found the Article 134, UCMJ, conviction was proper because the conduct in that case was not a "lewd act." *Id.* at 369. The basis for this conclusion is significant for the instant case: "[The complainant's] cross-examination indicates that the language she and Appellant used was not calculated to 'incite lustful thought,' *but was a joke*—albeit a 'vulgar, filthy, or disgusting' one." *Id.*[12] (emphasis added).

[12] Note the CAAF quoted the complainant's testimony on this point, which is strikingly similar to OM's testimony. *Compare id*. at 370 n.9. *with* R. at 1237-38.

In addition to the joke described in *Avery*, other courts have found offensive language used to express other emotions or intentions does not constitute indecent language. The development of "indecent language" across the *MCM* has repeatedly focused on the "calculated" effect of the language, which, if this Court finds "indecent" equivalent to "obscene" as argued above, is contained in the prurient interest analysis. *See Negron*, 60 M.J. at 140-41. However, if they are not equivalent, Article 120b(c), UCMJ, still has two intent components: the language's intended effect (tendency to incite lustful thought) and the actual element of specific intent of the speaker (intent to abuse, humiliate, or degrade or arouse or gratify sexual desire). These are different elements as applied to TSgt Folts. If the language's intended effect is not "to incite lustful thought," he cannot be convicted. For example, in *Negron*, the appellant was charged with depositing obscene matter in the mail after sending a letter to a bank who had denied his loan application. The letter stated:

> Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?

Negron, 60 M.J. at 144.

The CAAF found, "[T]he facts establish only that an angry and frustrated servicemember resorted to using improper language to express his feelings. Under the narrow definition of indecent language applied in *Brinson*, Appellant's language was not obscene." *Id.* Similarly, in *United States v. Pagano*, ARMY 20180439, 2020 CCA LEXIS 192, *5-11 (Army Ct. Crim. App. 2020) (unpub. op.), the appellant uttered "reprehensible," "inappropriate and disgusting" comments, but out of anger, not sexual desire. As such, he could not be convicted of "indecent language." As already argued above, nothing about the memes is intended to "incite lustful thought" in the reader. Context shows this even more so because there is nothing indicating TSgt

Folts – by all accounts a good father – was trying to be anything but funny. This goes to the specific intent element as well.

If TSgt Folts was, in fact, sending the memes to be funny and not to gratify his sexual desire, as charged, he is not guilty of this offense. The Government offered no evidence supporting an argument TSgt Folts sent the memes for an unlawful purpose. Language sent for some purpose other than to gratify his sexual desire is not unlawful – not to mention this is the only theory the Government charged under, and it did not ask for exceptions or substitutions.

G. Conclusion.

Even considering the evidence in the light most favorable to the Government, no *rational* finder of fact could find guilt beyond a reasonable doubt. The evidence is legally insufficient in at least two ways: the language did not meet the definition of indecent and the memes were not sent with the intent to gratify TSgt Folts' sexual desire.

Even if the Court finds legal sufficiency, the quantity and quality of the evidence of guilt in this case is so lacking that this Court must have a reasonable doubt. The evidence is factually insufficient.

Because the communications at issue were lawful, TSgt Folts had a constitutional right to send them. U.S. CONST. amend. I.

This Court should set aside the findings and the sentence and dismiss the charges and specifications with prejudice.

II.
TSGT FOLTS DID NOT HAVE FAIR NOTICE THAT SENDING THE THREE MEMES CONSTITUTED SEXUAL ABUSE OF A CHILD.

A. Standard of Review.

Because there was no objection at trial on this basis, this Court will review for plain error. *United States v. Rocha*, 2024 CAAF LEXIS 250 (C.A.A.F. May 8, 2024) (citation omitted). TSgt Folts has the burden of showing error occurred that is plain or obvious and "materially prejudiced a substantial right." *Id.* (citation omitted). Because "the error rises to the level of a constitutional violation, the burden shifts to the government to show that the error was harmless beyond a reasonable doubt." *Id.* (citation omitted).

B. Due Process Requires Notice that *Conduct* is Unlawful.

The CAAF recently confirmed:

> The Fifth Amendment prohibits the deprivation of "life, liberty, or property" without due process. U.S. Const. amend. V. The Supreme Court has stated that due process requires a statute to provide "a person of ordinary intelligence" fair notice of prohibited conduct. *United States v. Williams*, 553 U.S. 285, 304 (2008). The "touchstone" of fair notice "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's *conduct* was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

Id. (emphasis added).

"Potential sources of fair notice may include federal law, state law, military case law, military custom and usage, and military regulations." *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013) (citation omitted). CAAF further noted, "The test for constitutional notice that conduct is subject to criminal sanction is one of law. It does not turn on whether we approve or disapprove of the conduct in question." *Id.*

C. TSgt Folts Did Not Have "Fair Notice" His Conduct Was Criminal.

TSgt Folts does not challenge Article 120b, UCMJ, as a whole; rather, he argues the statute does not make reasonably clear that the conduct at issue in this case, sending the three memes to OM, was unlawful. As CAAF noted, the applicable section of Article 120b, UCMJ, does not define "indecent." *Avery*, 79 M.J. at 368. As discussed in Issue I, *supra*, the memes were not indecent on their face, nor do they meet the other definitions in the MCM.

The CAAF rejected the Government's argument that an "aura of criminality" can provide notice that conduct is criminal. *United States v. Merritt*, 72 M.J. 483, 488 (C.A.A.F. 2013) (finding a lack of fair notice that viewing child pornography was unlawful prior to its express prohibition in state, federal, and military statutes). The CAAF also held, "although child pornography is a highly regulated area of criminal law, no prohibition against possession of images of minors that are sexually suggestive but do not depict nudity or otherwise reach the federal definition of child pornography exists in any of the potential sources of fair notice set out in [prior case law]," so the appellant did not have the fair notice to which he was entitled). *Warner*, 73 M.J. at 4. This Court should similarly reject an argument that TSgt Folts was on notice that sending sexually-related, humorous communications to OM was unlawful just because he was on notice that sending "indecent" language to her was unlawful – especially when his communications do not meet the definition of "indecent" and were not send with a criminal state of mind. He must have had "fair notice" that his conduct was prohibited. He did not, so a due process violation constituting plain error occurred. TSgt Folts was convicted of sexual abuse of a child based *solely* on his conduct in sending the memes; the Government cannot show beyond a reasonable doubt, as it must, the error is harmless.

This Court should set aside the findings and the sentence and dismiss the charges and specifications with prejudice. *Merritt*, 72 M.J. at 492 ("As we have set aside the finding on the 'viewing' charge for lack of due process notice, there can be no rehearing on that charge.").

III.
TSGT FOLTS HAS BEEN UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO POSSESS A FIREARM.

A. Standard of Review.

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

B. 18 U.S.C. § 922 Is Unconstitutional as Applied to TSgt Folts.

TSgt Folts did not commit a *violent* felony. Even assuming he did, the Government has not demonstrated 18 U.S.C. § 922(g)(1), as applied to him as a *lifetime* firearm ban, is consistent with the Nation's historical tradition of firearms regulation.

The test for applying the Second Amendment is as follows:

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

Bruen, 597 U.S. at 17 (citation omitted).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to TSgt Folts, who stands convicted of a nonviolent offense (sexual abuse of a child through indecent communication). TSgt Folts did not commit, intend, or attempt to do bodily harm, nor is any injury or fear of injury an element of this non-touching offense. To prevail, the Government would have to show a historical tradition of applying an undifferentiated

ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy – all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id*. at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* at 701 (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that 18 U.S.C. § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69

F.4th 96, 98 (3rd Cir. 2023), *petition for cert. filed*, No. 23-374 (U.S. Oct. 5, 2023).[13] Evaluating 18 U.S.C. § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. The Third Circuit went beyond that, though, to also note, "Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally." *Id*. at 105 (citations omitted). The Third Circuit stated that even if the appellant had used a gun, "government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession," strongly calling into question the constitutionality of any lifetime firearm ban. *Id*.

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably,

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[13] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range at 5, *Garland v. Range*, __ U.S. __ (U.S. Oct. 18, 2023) (No. 23-374).

the "federal felon disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

This is not the only provision of 18 U.S.C. § 922 to have come under fire in light of *Bruen*. The Fifth Circuit recently held that 18 U.S.C. § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 450 (citing *Bruen*, 597 U.S. at 17). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it recognized that *D.C. v. Heller*, 554 U.S. 570 (2008), and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451 (citing *Heller*, 554 U.S. at 635). Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452 (citing *Heller*, 554 U.S. at 627 n.26). Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of a nonviolent offense. *Id.*

Third, *Rahimi* found the Government failed to show "§ 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed-upon domestic violence restraining order violation, then it similarly does not include barring TSgt Folts from *ever* possessing firearms for a nonviolent offense.

In addition to *Rahimi*, the Fifth Circuit has found that 18 U.S.C. § 922(g)(3) – which bars firearm possession for unlawful drug users or addicts – is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of 18 U.S.C. § 922(g)(3). *Id*. In finding this subsection unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. The reasoning in both *Rahimi* and *Daniels* further supports the limited scope of relevant historical firearms regulation.

In light of *Bruen*, 18 U.S.C. § 922(g)(1) is unconstitutional as applied to TSgt Folts because he did not commit a violent offense and the Government has also not shown a *lifetime* ban is consistent with the Nation's historical tradition of firearms regulation.

C. This Court May Order Correction of the EOJ.

In *Lepore*, citing to the 2016 Rules for Courts-Martial (R.C.M.), this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Lepore*, 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." *Lemire*, 82 M.J. 263, at n.* (C.A.A.F. 2022) (decision without published opinion). This disposition stands in tension with *Lepore*.

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[14] Second, the CAAF believes that Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then they also have

[14] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *Manual for Courts-Martial, United States* (2019 ed.), App. 15 at A15-22.

the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.[15]

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." *Lepore,* 81 M.J. at n.1. In the 2019 *MCM*, both the Statement of Trial Results (STR) and the Entry of Judgment (EOJ) contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under 18 U.S.C. § 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires – by incorporation – a determination on whether the firearm prohibition is triggered.[16] Under R.C.M. 1111(c)(2), this Court can modify the EOJ itself, to correct this erroneous entry without taking the case en banc. If this Court disagrees, TSgt Folts offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

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[15] *See also United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. 2024) (granting review of ACCA decision to change firearm prohibition and the issue of whether the CCAs and the CAAF have the power to make such a modification).

[16] *See also United States v. Macias*, No. 202200005, 2022 CCA LEXIS 580, at *3-4 (N.M. Ct. Crim. App. Oct. 13, 2022) (unpub. op.) (modifying pursuant to R.C.M. 1111(c)(2) the STR's erroneous indication appellant subject to firearm ban); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164, at *1 (Army Ct. Crim. App. Mar. 17, 2022) (unpub. op.) (ordering correction of STR to change 18 U.S.C. § 922(g)(1) designator to "No"); *United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531, at *2 (N.M. Ct. Crim. App. Oct. 18, 2021) (unpub. op.) (ordering correction of STR because it incorrectly stated 18 U.S.C. § 922 did not apply).

D. Conclusion.

TSgt Folts respectfully requests this Court hold 18 U.S.C. § 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

Conclusion

This Court should find that the Government failed to prove each element of the offense of conviction beyond a reasonable doubt. He was not on notice his conduct was unlawful, and he had a First Amendment right to send the memes at issue. Finally, this Court should order correction of case documents indicating he is banned from possessing a firearm for life. TSgt Folts asks the Court to dismiss the charge and specification with prejudice.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing document was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 16 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Special Panel
Technical Sergeant (E-6) **DOUGLAS M. FOLTS** United States Air Force *Appellant.*	)	No. ACM 40322 17 June 2024

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

ISSUES PRESENTED

I.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THE LANGUAGE COMMUNICATED (THE MEMES) WAS INDECENT—SYNONYMOUS WITH OBSCENE—OR COMMUNICATED WITH CRIMINAL INTENT.

II.

APPELLANT DID NOT HAVE FAIR NOTICE THAT SENDING THE THREE MEMES CONSTITUTED SEXUAL ABUSE OF A CHILD.

III.

AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case. Appellant received Article 65(d) review on 6 July 2022. Thus, his court-martial was final under Article 57(c)(1) before the 23 December 2022 change to Article 66 that would purportedly give this Court jurisdiction over his court-martial. *See* Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022). The United States asserts that this Court has no jurisdiction to review Appellant's case, but recognizes this Court's contrary, published decision in United States v. Vanzant, ___ M.J. _____ (A.F. Ct. Crim. App. 28 May 2024). The United States continues to assert this position regarding lack of jurisdiction in case of additional litigation at our superior Court.

STATEMENT OF FACTS

Appellant Becomes OM's Stepfather

In 2014, Appellant married OM's mother and became a stepfather to OM and her younger brother. (R. at 1173-75.) In the following years, OM cycled between spending two years with her mother and Appellant, then two years with her father and his family. (R. at 1176-79, 1608-09.) Whenever OM was living with one parent, she would spend Christmas, summer, and spring breaks with the other parent. (R. at 1608-09.)

In 2019, OM was living with her biological father in Germany. (R. at 1181.) Appellant and OM's mother, meanwhile, were living in Alaska. (R. at 1181-82.) During this time, Appellant and OM—who had developed a good relationship—began communicating via Skype.[1] (R. at 1180-81, 1224-25; Pros. Ex. 5.)

[1] Skype is a telecommunications application with instant messaging, voice, and video calling features. ABOUT SKYPE, https://www.skype.com/en/about/ (last visited Jun. 11, 2024).

Appellant's Skype Conversations With OM

In September 2019, OM—who was 13 years old at the time—told Appellant via Skype that she had a girlfriend. (Pros. Ex. 5 at 1; R. at 1227.) During their conversation, Appellant told OM that he thought she "would say yes to anyone who asked [her] out regardless of race, sex or gender." (Pros. Ex. 5 at 3.) Towards the end of the chat conversation, Appellant sent OM a meme[2] consisting of a picture of two clothed female buttocks next to a picture of two women in bikinis, both depicting varying lower and upper body proportions, respectively. (Pros. Ex. 5 at 5.) The words "garlic bread" were superimposed over the buttocks and chest of the women of larger proportions, while the word "bread" was superimposed over the women of smaller proportions. (Id.) After sending the meme, Appellant sent a follow-up message suggesting that OM and her girlfriend "would appreciate these." (Pros. Ex. 5 at 5.) OM was surprised when Appellant sent her the meme—he had never sent anything like that before she started "developing" during eighth grade. (R. at 1228.) OM interpreted the meme as having a sexual connotation, because it suggested the women with larger buttocks and breasts were better than those of smaller proportions, much like how "garlic bread is better than just regular bread." (R. at 1229.)

Sometime later, Appellant sent OM another meme of what appeared to be a fish with a spherical appendage hanging from it and the following caption: "The horngus of a dongfish is attached by a scungle to a kind of dillsack (the nutte [sic] sac)." (Pros. Ex. 5 at 10.) OM had no idea how to respond. (R. at 1230.) Based on the reference to a "nut sack," OM thought the meme had a sexual connotation. (R. at 1229-1230.) Feeling disgusted and unamused, she replied: "What the fjhgusgtfgcjv." (R. at 1230; Pros. Ex. 5 at 10.)

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[2] A "meme" is an amusing or interesting item (such as a captioned picture of video) or genre of items that is spread widely online especially through social media. *Meme*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/meme (last visited Jun. 11, 2024).

In late September, OM and Appellant were on Skype discussing her trip to an apple festival when Appellant sent her a message that said: "That looks like sperm." (R. at 1230-31; Pros. Ex. 5 at 18.) Appellant then said, "It's sperm. Semen. Jizz." (Pros. Ex. 5 at 19.) OM replied, "No, eww, no, no, no." (Pros. Ex. 5 at 19.) OM found Appellant's insistence "weird," because "there would be no reason for anything [near her] to have sperm on it." (R. at 1231.) After approximately thirty minutes, Appellant messaged OM again: "You get the jizz stain out?" (Pros. Ex. 5 at 19.) OM told Appellant "it's not that," and that she was still cleaning her room. (Id.) Appellant responded: "'Cleaning.' I understand. Wash your hands when you're done." (Pros. Ex. 5 at 20.) OM told Appellant she hated him because she "wouldn't be doing anything like that." (Pros. Ex. 5 at 20; R. at 1231-32.)

At various points in their Skype conversations, Appellant asked OM about her relationship with her girlfriend, such as whether they had kissed and whether OM was "attracted to her [girlfriend's] female features or …attracted to [the] idea that a human likes [OM]." (Pros. Ex. 5 at 11, 12.) Eventually, OM told Appellant that she and her girlfriend had kissed three times. (Pros. Ex. 5 at 23.) In response, Appellant called OM a "slut," before asking, "How was it?" (Id.) Appellant asked OM if they kissed "3 times in one go or 3 separate times," and whether they kissed "[j]ust on the lips" or with "lips and tongue." (Id.) In total, Appellant sent seven messages in quick succession, ending with: "TELLLLLLLL MEEEEEEE." (Id.) OM, who found it weird that Appellant wanted to know the details, responded "eww," before eventually describing the kiss. (R. at 1232; Pros. Ex. 5 at 23.) Upon learning that OM's girlfriend initiated the kiss, Appellant told OM to "be ready" because her girlfriend was "going to make the next move beyond kissing." (Pros. Ex. 5 at 24.) Appellant continued to question OM about the circumstances of her kiss before telling her: "That feeling you had is the same with males or females. J ust saying…don't be afraid

to experiment." (Pros. Ex. 5 at 24.) Appellant then asked OM if she was "doing anything [she] shouldn't." (Pros. Ex. 5 at 25.)

The next day, OM responded to Appellant and told him that "[n]othing happened." (Pros. Ex. 5 at 26.) Appellant replied: "That was so like yesterday's comment. How was today? You pregnant?" (Pros. Ex. 5 at 26.) After OM denied being pregnant, Appellant asked OM if her girlfriend was a virgin. (Pros. Ex. 5 at 27.) OM was confused and "weirded out"—she did not understand why that mattered to Appellant or why he was interested. (R. at 1234.) Nevertheless, OM told Appellant that her girlfriend was a virgin. (Pros. Ex. 5 at 27.) Appellant responded by asking OM how she knew, before asking what the two girls were doing to advance their relationship:

> You planning on doing anything with her? She asked you out, kissed you and now, what? You don't hang out after school. I imagine you two talk, text, *sext* on the phone? But what you are two doing to further developed [sic] your relationship?

(Pros. Ex. 5 at 28) (emphasis added).

Approximately a week and a half later, OM told Appellant that she and her girlfriend broke up because the latter was interested in a guy. (Pros. Ex. 5 at 31.) As OM described being upset about the break-up, Appellant told her that she was "very pretty," and "very beautiful." (Pros. Ex. 5 at 31-32.) He concluded by telling OM that relationships were like a "buffet" and that she was "hot enough so [she] can be picky." (Pros. Ex. 5 at 32.)

Over the next month, Appellant asked OM if she had kissed anyone and if she was going to "try the outie" since "the innie didn't work." (Pros. Ex. 5 at 34-35.) Several months later, after OM attended a function with a male friend, Appellant messaged her to ask for details. When OM told him that she and her friend had danced and had a lot of fun, Appellant asked: "Am I gonna be a grandpa?" (Pros. Ex. 5 at 37.)

The Three Memes

In March 2020, OM messaged Appellant to wish him a happy birthday. (Pros. Ex. 5 at 38.) Several hours later, at 0258 hours, Appellant sent OM three memes. (Pros. Ex. 5 at 39). At the time Appellant sent the memes, it had been hours since OM's last message to him. (Id.) The memes depicted the following:

> (1) A woman with large breasts, wearing a tank top and going through an airport security checkpoint, with the caption: "Me: we're gonna have to perform a cavity search / Her: but the detector didn't even- / Me: ma'[a]m it's just protocol";
>
> (2) A collage consisting of images of a hand with one finger extended, two fingers extended, and a man with an amputated arm, paired with images of a woman who appears to be experiencing various degrees of pleasure, with the caption: "Different levels of adult pleasure funny adult meme"; and
>
> (3) An image of female genitalia with the cartoon character Piglet superimposed over it, with the caption: "Wherever you see Piglet, you know Pooh is only a few inches away."

(*See* Pros. Ex. 6.)

Upon receiving the memes, OM replied, "eww, what the hell?" (R. at 1238; Pros. Ex. 5 at 40.) OM interpreted the first meme as an "inappropriate" reference to the woman's body, which was "on the curvier side." (R. at 1235-36.) She understood the second to be a reference to "being fingered." (R. at 1237.) OM did not understand what the third meme meant but recognized that the picture was of female genitalia. (R. at 1238.) Overall, OM was "disgusted" by the memes and did not understand why Appellant sent them to her. (R. at 1238.)

Appellant Expresses Sexual Interest in OM

Later that year, OM went to visit Appellant and her mother in Alaska. (R. at 1181, 1411.) During this visit, OM noticed that Appellant was acting differently toward her. (R. at 1190.) On one occasion, while Appellant and OM were out for a drive, Appellant parked on an abandoned

street and told OM he had to tell her something, but that she could not tell her mother. (R. at 1190-91, 1195-96.) Appellant then proceeded to tell OM that he thought her legs were "sexy"; that he would "go crazy" whenever OM wore "booty shorts" around the house; and that when OM was running, her breasts "bounced" such that men would stare. (R. at 1196-97.) Appellant likened OM to a "smaller version" of her mother and pressed her to describe her own legs as "sexy." (Id.) OM, who was fourteen years old, was terrified. (R. at 1197.) Not knowing what to say, OM laughed and said "okay." (R. at 1197.) Later, as they drove home, Appellant asked OM to promise that she would not say anything to her mother. (R. at 1200.) On another occasion, while at home, Appellant told OM that he thought her "ass looked good in those jeans." (R. at 1201.)

Towards the end of OM's stay, OM and Appellant were sitting on the couch together while everyone else was out of the house. (R. at 1204-05.) OM asked Appellant if there was "something wrong" with his marriage to her mother, "because it's not normal for [him] to talk to [his] stepdaughter about those things." (R. at 1202.) Appellant denied having any marital problems. (R. at 1205.) He then put his hand on OM's leg and began moving it towards her inner thigh. (R. at 1206.) Appellant told OM that "if he had his way, [OM would] be in up in the bedroom with him." (R. at 1208-09.) Scared and uncomfortable, OM swatted his hand away and got off the couch. (R. at 1206.) Appellant followed OM off the couch and told her that he wanted to have a threesome[3] with OM and her mother. (R. at 1208-09.) Disgusted, OM responded, "No." (R. at 1208-09.) A week later, OM returned to Germany. (R. at 1210-11.)

The remaining facts necessary for the disposition of the offenses are set forth below.

[3] A "threesome" is a sexual encounter involving three people. *Threesome*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/threesome (last visited Jun. 16, 2024).

ARGUMENT

I.

APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD BY INDECENT COMMUNICATION IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

At trial, Appellant was convicted of one specification of sexual abuse of a child by indecent communication, in violation of Article 120b, UCMJ. The specification, as stated on the charge sheet, read as follows:

> In that TECHNICAL SERGEANT DOUGLAS M. FOLTS, United States Air Force, , Eielson Air Force Base, Alaska, did, at or near North Pole, Alaska, on or about 21 March 2020, commit a lewd act upon [OM] a child who had not attained the age of 16 years, by intentionally communicating to [OM] indecent language, with an intent to gratify his sexual desire.

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

Standard of Review

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

Law & Analysis

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

evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993). "While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993).

To sustain a conviction for sexual abuse of a child by indecent communication in violation of Article 120b(c), UCMJ, the evidence must prove beyond a reasonable doubt that:

> (1) That at or near North Pole, Alaska, on or about 21 March 2020, Appellant committed a lewd act upon OM, by intentionally communicating indecent language with an intent to gratify his sexual desire; and
>
> (2) That at the time of the lewd act OM had not attained the age of 16 years.

See Manual for Courts-Martial, United States part IV, para. 62.b(1) (2019 ed.) (MCM).

A "lewd act" is, *inter alia*, "intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person." 10 U.S.C. § 920b(h)(5).

In alleging that his conviction is legally and factually insufficient, Appellant contends that "[his] language did not meet the definition of indecent and the memes were not sent with the intent to gratify [Appellant's] sexual desire." (App. Br. at 19.) In so contending, Appellant relies on a skewed interpretation of the evidence that this Court should decline to adopt, since appellate courts are not required to accept an appellant's view of the record of trial or the inferences which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990). As set

forth below, the combination of direct and circumstantial evidence "produced at trial" is factually sufficient to affirm Appellant's conviction for sexual abuse of a child. Dykes, 38 M.J. at 272.

A. The applicable definition of "indecent language" can be found in the Manual, not obscenity case law.

As a preliminary matter, Appellant's arguments that the memes are protected speech because they "do not fall within the definition of obscenity" are without merit, because the definition of obscenity that Appellant uses is inapplicable here. (App. Br. at 13.)

Article 120b, UCMJ, does not define "indecent language." *See* 10 U.S.C. § 920b(h). Citing the fact that courts have held "'indecent' is synonymous with obscene," United States v. Meakin, 78 M.J. 396, 401 (C.A.A.F. 2019), Appellant seizes upon the absence of a statutory definition to suggest that this Court apply First Amendment case law relating to "obscene materials" as found in Miller v. California, 413 U.S. 15, 23 (1973). (*See* App. Br. at 8, 13.) This Court should decline to do so. First, because the question before this Court is *not* whether the memes—standing alone—are "obscene materials" within the meaning of Miller, but whether the *sending* of those memes to OM constituted indecent language to a minor. Second, because in holding that "indecent" is synonymous with "obscene," our superior Court did not suggest that jurisprudence about the former could be swapped for that of the latter. *See* Meakin, 78 M.J. at 401; United States v. Moore, 38 M.J. 490, 492 (C.M.A. 1994). Rather, it meant that indecent language—like obscene speech—"is not afforded constitutional protection." Moore, 38 M.J. at 492.[4] And third, while indecent language is not defined in Article 120b, UCMJ, it *is* defined in the presidentially enumerated Article 134 offense of indecent language. *See* MCM, pt. IV, para. 105.c.

[4] Because the language at issue is unprotected speech, further analysis under United States v. Wilcox, 66 M.J. 422 (C.A.A.F. 2008) is not required.

"[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning." IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005). This presumption of consistent usage also applies to textual interpretation of the Manual. *See* United States v. Brown, 84 M.J. 124, 129 (C.A.A.F. 2024) (according the "same meaning and effect" to a word based on the Manual's "repeated use of the same word"). That presumption is warranted here. Given that the presidentially enumerated Article 134, UCMJ, offense of indecent language predates the congressionally enacted Article 120b, UCMJ, offense by "several decades," United States v. Avery, 79 M.J. 363, 367 (C.A.A.F. 2020), this Court "[should] not lightly assume that Congress silently attache[d] different meanings to the same term." Azar v. Allina Health Servs., 587 U.S. 566, 574 (2019).

Under this framework, the President's definition of "indecent language" is instructive with respect to Article 120b(c):

> Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

MCM, pt. IV, para. 105.c (emphasis added).

Our superior Court's observations in Avery further inform the definition of "indecent language" as applied to Article 120b. 79 M.J. at 368. In finding that Article 120b did not preempt the Article 134 offense of indecent language, the Court of Appeals for the Armed Forces noted that the "[indecent language] element of Article 134, UCMJ, can be satisfied in two different ways, and Article 120b(c), UCMJ, covers only one of them." Id. The Court differentiated between language that is (a) grossly offensive because of its "tendency to incite lustful thought," and (b) grossly offensive because its "vulgar, filthy, or disgusting nature." Id. at 368. The Court further

noted that Article 120b "criminalizes neither all indecent language, nor vulgar language as a whole, but only indecent language that constitutes a 'lewd act'—that is, a 'sexually unchaste or licentious' act." Id. at 369.

Taken altogether, the Manual and case law compel the conclusion that "indecent language" for purposes of Article 120b(c), UCMJ, is that which is "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of … its tendency to incite lustful thought." MCM, pt. IV, para. 105.c; *see* Avery, 79 M.J. at 368. Considering this, the Miller test for obscene materials—on which Appellant relies—is inapplicable. By extension, the fact that the memes "do not portray sexual *conduct* in a patently or grossly offensive way" does not mean Appellant's language was not indecent. (*See* App. Br. at 13.)

B. The memes constituted indecent language and were therefore unprotected speech.

The test for determining whether language is indecent is "whether the particular language is calculated to corrupt morals or excite libidinous thoughts.'" United States v. Hullett, 40 M.J. 189, 191 (C.M.A. 1994) (citation omitted). This determination cannot be made in isolation. United States v. Green, 68 M.J. 266, 270 (C.A.A.F. 2010) (citing United States v. Brinson, 49 M.J. 360, 364 (C.A.A.F. 1998)). Rather, this Court must "examine the *entire* record of trial to determine the precise circumstances under which the charged language was communicated." Green, 68 M.J. at 270 (finding the language "mmm-mmmm-mmmm" indecent because it was accompanied by the appellant pulling down his female coworker's shirt to look at her breasts, *after* he had made sexual overtures and rubbed his pelvic region on her buttocks). That is because "the character of every act depends upon the circumstances in which it is done." Schenck v. United States, 249 U.S. 47, 52 (1919). Thus, "[l]anguage which is on its face innocuous may be indecent if the *context* in which the language is used sends an indecent message." Hullett, 40 M.J. at 191 (emphasis added).

The idea that "[w]ords that are innocent or appropriate in one context may take on an indecent meaning in another" is made even more evident in cases involving communications to children. United States v. Knarr, 80 M.J. 522, 532 (A.F. Ct. Crim. App. 2020); *see also* United States v. French, 31 M.J. 57, 60 (C.M.A. 1990). This Court's analysis in Knarr is instructive in this regard. 80 M.J. at 532. The appellant in Knarr was charged with attempted sexual abuse of a child by indecent language after he texted the following lyrics from a Ludacris song to "Ella," a person he believed to be 14 years old:[5]

> I wanna li-li-li-li-lick your [sic] from your head to yo toes, I wanna move from the bed down to the down to the floor and I wanna ah ah make it feel so good you don't wanna leave. So tell me what is your fa-fa-fantasy?

Id. at 531.

In finding that the communication was indecent—even though it was comprised entirely of publicly available lyrics from a commercially released song by a well-known recording artist—this Court noted that the appellant had previously sent "numerous sexually charged messages to 'Ella'" and "did not share these lyrics in the context of a discussion about music or recording artists." Id. Based on this context, the Court determined that the appellant's use of the lyrics was "a continuation of prior communications expressing his sexual desires for someone who he believed to be a 14-year-old child." Id. at 532.

This case is analogous to Knarr in more ways than one. Both Appellant and the accused in Knarr exchanged messages with their child victims for several months prior to the charged communications, during which time they "repeatedly turned their exchanges to sexual topics." 80 M.J. at 527. Much like how the accused in Knarr asked "Ella" whether and how she masturbated,

[5] "Ella" was a persona—not a real child—created by the Naval Criminal Investigative Service and managed by various agents involved in the operation. Knarr, 80 M.J. at 528.

id., Appellant in this case queried OM about the physical aspects of her dating relationship with another teenager—such as whether OM had kissed her girlfriend, how they kissed, whether the girlfriend was a virgin, what the two girls were doing to "further" their relationship, and whether OM was pregnant. (*See* Pros. Ex. 5.) Prior to the charged incident, Appellant also sent OM two other memes with sexual connotations; brought up the topic of sperm; told her not to be afraid of experimenting with males as well as females; and told OM that she was "pretty," "beautiful," and "hot." This is not the behavior of a parent who is curious about his stepdaughter's happiness or concerned about safe sex practices. Rather, it is textbook grooming behavior—that is, "the sexualization of the relationship over time through repeated contact and attempts to gain affection." United States v. Winckelmann, 70 M.J. 403, 408 n.6 (C.A.A.F. 2011) (citation omitted) (internal quotation marks omitted).

After several months of veiled references to sex, Appellant sent OM the three memes at issue in this case—which, as Appellant concedes, "are quite *obviously* sex jokes." (App. Br. at 13) (emphasis added). The three memes Appellant sent on or about 20 March 2020 were much more sexually explicit than those he had sent OM previously—the first two implicated bodily penetration (i.e. a cavity search and digital penetration), while the third depicted actual female genitalia. (*See* Pros. Ex. 6.) And just as the accused in Knarr did not share the lyrics in the context of a discussion about music, 80 M.J. at 532, Appellant did not share the memes in the context of a discussion about humorous internet finds or in a response to anything OM said. Rather, lending credence to the adage that "nothing good happens after midnight," Appellant sent the memes in the wee hours of the morning. In this context, there is no *reasonable* doubt that Appellant's communication was "calculated to corrupt morals or 'excite libidinous thoughts.'" Hullett, 40 M.J. at 191.

That the memes were not accompanied by any contemporaneous, blatant expressions of sexual interest in OM does not mean they were not indecent. (*See* App. Br. at 15.) Even seemingly mundane language can be rendered indecent by virtue of who it is communicated to and community standards about what that language might mean. French, 31 M.J. at 60. For example, "[w]hen an adult male asks his minor female stepdaughter if he can climb into bed with her, community standards are such that it is not unreasonable to accuse him of asking for something more than a restful sleep." Id. That is because the applicable "community standards" are those of the military community, Hullett, 40 M.J. at 191, which has an established custom of protecting dependents, including children, from physical, emotional, and sexual harm. United States v. Vaughan, 58 M.J. 29, 32 (C.A.A.F. 2003). And in the military, "[w]e expect a lot of our servicemembers, and sometimes we expect more of them than of their civilian counterparts." United States v. Rivera, 54 M.J. 489, 491-92 (C.A.A.F. 2001). Thus, when Appellant sends sexual memes to his 14-year-old stepdaughter at two o'clock in the morning, "community standards are such that it is not unreasonable to accuse him of [trying to incite lustful thought]," French, 31 M.J. at 60, as opposed to simply being "humorous." (*See* App. Br. at 15.)

"Context matters." Avery, 79 M.J. at 369. While the memes at issue in this case may have been innocent or appropriate in another context—e.g., if Appellant had sent them to other adults—they took on an indecent meaning in this one. Knarr, 80 M.J. at 532. Appellant sent sexual memes to his 14-year-old stepdaughter after months of encouraging her physicality in dating, probing her about sexual activity, and telling her that she was attractive. Considering this, there is no *reasonable* doubt that Appellant's communication was calculated to "excite libidinous thoughts" or "incite lustful thought." Hullett, 40 M.J. at 191; Avery, 79 M.J. at 368. Viewing all this evidence in the light most favorable to the prosecution, any rational trier of fact would conclude

that Appellant's communication was indecent. Robinson, 77 M.J. at 297-298. This Court should be similarly convinced. Rosario, 76 M.J. at 117.

C. The circumstantial evidence proves beyond a reasonable doubt that Appellant sent the memes with an intent to gratify his sexual desire.

Next, Appellant alleges that there is insufficient evidence that he sent the memes with an intent to gratify his sexual desire and contends that he was "just trying to be funny." (*See* App. Br. at 15-19.) This Court should be unpersuaded, given the wealth of evidence regarding Appellant's sexual interest in OM. Specifically, evidence that:

(1) Appellant told OM her legs were "sexy";

(2) Appellant told OM he would "go crazy" when she wore "booty shorts";

(3) Appellant told OM that her breasts "bounced" when she ran;

(4) Appellant touched OM's inner thigh;

(5) Appellant told OM that if he "had his way, [OM would] be up in the bedroom with him"; and

(6) Appellant told OM that he wanted to have a threesome with her and her mother.

(R. at 1196-97, 1208-09.)

Although most of this evidence was offered as evidence of other (acquitted) offenses that occurred in summer 2020 after the sending of the memes, it is still relevant and admissible to prove Appellant's intent at the time of the convicted offense. Pursuant to United States v. Hyppolite, evidence of one charged offense may be used to prove elements of another, provided it is admissible for a proper, non-propensity purpose under Mil. R. Evid. 404(b)(2). 79 M.J. 161, 165 (C.A.A.F. 2019). And as demonstrated by United States v. Schneider, evidence of a subsequent act can be admissible to establish intent in an earlier act, even if the accused has been acquitted of the latter act. 38 M.J. 387, 392 (C.M.A. 1993). After twice attempting to murder his wife—once

in October and once in November—the accused in Schneider faced two prosecutions. Id. at 389-390. In the civilian prosecution for the November attempt, the accused was acquitted. Id. at 390. At his court-martial, where he was being prosecuted for the October attempt, the prosecution introduced evidence of the November attempt in support of a perjury charge. Id. at 392. In denying the accused's due process claim on appeal, our superior Court held that evidence of the November attempt would have been independently admissible to prove motive, intent, and modus operandi. Id. at 392.

Most recently, in United States v. Rodriguez, the Court of Appeals for the Armed Forces reiterated that "circumstantial evidence—from before *or after* the act—may be used to prove an actor had the requisite intent at the time of the act." 79 M.J. 1, 4 (C.A.A.F. 2019) (emphasis added). Like Appellant in this case, the accused in Rodriguez was charged with sexual abuse of child—specifically, committing a lewd act on an 8-year-old on divers occasions between December 2014 and April 2015 by "kissing [the child's] feet with his lips, with an intent to arouse and gratify his own sexual desire." Id. at 2. As evidence of the accused's intent, the prosecution introduced sexually explicit text messages that the accused sent to his adult partner—with whom he shared a foot fetish—in April 2015, in which he mentioned the child victim's feet in connection with the couple's sexual fantasies. Id. at 3-5. On appeal, the accused asserted that "the mens rea and actus reus of his crime were too attenuated to sustain a conviction." Id. at 3. The Court disagreed and held that based on the texts and other evidence suggesting that accused was aroused by the child's feet, it was reasonable for the factfinder to infer the accused "had a specific sexual intent" *when* he kissed the child's feet, "just as he had a sexual intent when he sent the lewd text messages." Id. at 5.

Here, circumstantial evidence from both before and after the charged act demonstrate that Appellant intended to gratify his own sexual desires at the time he sent the memes. Appellant first betrayed his interest in OM in the months preceding the charged act—during which he repeatedly alluded to OM's physicality and sex—when he became pushy upon learning that OM had kissed someone and demanded that OM tell him about it: "TELLLLLLLL MEEEEEEE." (Pros. Ex. 5.) He then confirmed this interest several months later, after the charged act, when he vocalized his sexual interest to OM in person and admitted that he wanted to engage in a threesome with her—confirming that he was aroused by a developing eighth grader. Based on Appellant's unnaturally keen interest in the physical aspect of OM's romantic relationships, combined with the fact that Appellant fantasized about engaging in sexual activity with OM, there is no *reasonable* doubt that Appellant had an intent to gratify his own sexual desire—likely by fantasizing—when he sent OM the three memes, all of which related to female bodies and sexual pleasure. Robinson, 77 M.J. at 297-298.

D. Conclusion

"[T]he context of a communication is critical to any determination of indecency." Knarr, 80 M.J. at 532. Here, that context demonstrates that Appellant: (1) sent three sexual memes after a months-long process of introducing increasingly sexualized topics to his conversations with OM, (2) expressed sexual interest in OM upon seeing her in person after sending the memes, and (3) fantasized about engaging in sexual activity with OM on at least one occasion. This evidence is legally and factually sufficient to prove both the indecent nature of Appellant's communication, as well his criminal state of mind. Accordingly, he is not entitled to relief.

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

II.

ARTICLE 120B PROVIDES FAIR NOTICE THAT COMMUNICATING INDECENT LANGUAGE—IN ANY FORM—WOULD CONSTITUTE SEXUAL ABUSE OF A CHILD.

Standard of Review

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

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

Law

The Fifth Amendment provides that "[n]o person shall…be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This due process guarantee requires that criminal statutes "give people of common intelligence fair notice of what the law demands of them." United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quotations omitted); *see also* Winters v. New York, 333 U.S. 507, 515 (1948) ("Men of common intelligence cannot be required to guess at the meaning of the enactment."). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." City of Chicago v. Morales, 527 U.S. 41, 58 (1999). For military servicemembers, "[f]air notice does not depend on military case law or state statute alone." United States v. Vaughan, 58 M.J. 29, 32 (C.A.A.F. 2003). Such notice can also be found in the Manual for Courts-Martial, military custom and usage, and military regulations. Id. at 31.

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

with which a defendant is charged." Parker, 417 U.S at 757. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Id. at 756.

For the first time, on appeal, Appellant challenges Article 120b, UCMJ, as providing insufficient notice. According to Appellant, the statute "does not make reasonably clear" that sending the three memes—which he describes as "sexually-related humorous communications"—was unlawful. (App. Br. at 21.) But as set forth below, Appellant had fair notice of what conduct was prohibited, and his contention is without merit.

Analysis

The test for vagueness asks whether a criminal statute "give[s] people of common intelligence fair notice of what the law demands of them." Davis, 139 S. Ct. at 2325. Here, a straightforward reading of Article 120b's text gives a reader of common intelligence ample notice of what conduct is proscribed: "Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." 10 U.S.C. § 920b(c). The statute then sets forth what constitutes a lewd act, as it applies to Appellant's case: "intentionally communicating indecent language to a child *by any means, including via any communication technology,* with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person." 10 U.S.C. § 920b(h)(5)(B) (emphasis added).

To the extent Appellant is implying that the failure of Article 120b, UCMJ, to define "indecent language" results in insufficient notice, this Court should be unpersuaded. (*See* App. Br. at 21.) Article 120b, UCMJ, is not the only offense in the Manual—which is a source of fair notice—that uses the words "indecent language." Indecent language is also punishable under the presidentially enumerated Article 134, UCMJ, offense. In defining this offense, the President provided a definition of "indecent language," which—as discussed in Section I—has been applied to Article 120b. *See* MCM, pt. IV, para. 105.c. In Avery, our superior Court examined the

application of this definition and determined that Article 120b, UCMJ, only criminalized language that was grossly offensive because of its tendency to incite lustful thought, whereas "the scope of indecent language prohibited under Article 134, UCMJ, extends well beyond that … with which Article 120b(c), UCMJ, is concerned." 79 M.J. at 368. Reading the statute, the Manual, and military case law altogether, a reader of common intelligence would understand that for the purposes of Article 120b(c), indecent language was that which is "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of … its tendency to incite *lustful thought.*" Avery, 79 M.J. at 368.

The fact that these sources of notice do not further specify every conceivable way a person could violate Article 120b(c), UCMJ, does not mean that Appellant had insufficient notice. To start, the plain language of the statute is clear that it makes punishable indecent language that is communicated "by *any* means, including via any communication technology." 10 U.S.C. § 920b(h)(5) (emphasis added). A person of ordinary intelligence need not "guess at the meaning" of this language. Winters, 333 U.S. at 515. It encompasses, without limitation, any and all means by which a person can communicate something—including memes like those at issue here.

Moreover, our jurisprudence has never required that a law or regulation "expressly set forth all conceivable instances of impermissible conduct" to meet the requirements of fair notice. *See* United States v. Pope, 63 M.J. 68, 74 (C.A.A.F. 2006) (holding that a regulation did not have to specify all possible prohibited behavior to provide fair notice, given the "evolving and innumerable ways" misconduct at issue could occur). The recently decided case of United States v. Rocha demonstrates why. No. 23-0134, 2024 CAAF LEXIS 250, at *2 (C.A.A.F. May 8, 2024).

In Rocha, our superior Court considered whether an accused had sufficient notice that having sex with a "lifelike" child sex doll—which had anatomically correct oral, anal, and vaginal

orifices, and was equipped with a speaker that emitted moaning sounds—constituted indecent conduct. Id. at *2-3. In finding that the presidentially enumerated elements and definitions of Article 134 provided fair notice that such conduct was prohibited, the Court emphasized that "absolute precision is not the standard," and that statutes must have the "requisite broadness to adequately deal with untold and unforeseen variations in factual situations." Id. at *12. In so doing, the Court implicitly recognized that that as the world and technology evolves, so too do the methods by which people can commit crime.

This case is a prime example. Like Rocha, this case involves material and conduct that would have been unthinkable less than a century ago—sexual memes that can be found on the internet and sent via instant messaging to a teenager on the other side of the world. This is a byproduct of what the Supreme Court has recognized as a "revolution of historic proportions"—the "Cyber Age." Packingham v. North Carolina, 582 U.S. 98, 105 (2017). And this revolution, the Court noted, has "vast potential to alter how we think, *express ourselves*, and define who we want to be." Id.

It should come as no surprise, then, that Article 120b(c)—which was enacted in 2011[6], well after the advent of the internet—criminalizes indecent language communicated "by any means." This language is "sufficiently definite to give notice of the required conduct to one who would avoid its penalties." Rocha, 2024 CAAF LEXIS 250, at *12. A person of common intelligence would understand Article 120b prohibited *all* forms of indecent communication, be it in-person conversation, phone call, card, email, text messages, memes, et cetera. Such a person would also recognize that just because a communication has some perceived "humorous" value

[6] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541(b), 125 Stat. 1298, 1407-09 (2011).

does not mean it is not indecent if it still tends to "incite lustful thought." At the same time, the statute is broad enough to "adequately deal with untold and unforeseen variations in factual situations," such as evolving forms of communication. Id. at *12.

Ultimately, the sufficiency of notice must be evaluated in "in the light of the conduct with which [Appellant] is charged." 417 U.S. at 757. After months of questioning his 14-year-old stepdaughter about physical intimacy and alluding to her sexual activity (e.g. asking if she was pregnant or if he was going to be a grandpa), Appellant sent her three memes of a sexual nature. He later admitted that he found her "sexy" and wanted to engage in a threesome with her. Under these circumstances, it is difficult to imagine a universe in which a person in Appellant's position would be unsure of how his conduct "fit[s] the definition" of an Article 120b(c) offense. Elonis, 575 U.S. at 735. Because "[o]ne to whose conduct a statute *clearly* applies may not successfully challenge it for vagueness," Parker, 417 U.S. at 756 (emphasis added), Appellant's claim is without merit. But even if it did not clearly apply—as Appellant contends—"it is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 338 (1952).

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

III.

THE 18 U.S.C. § 922 FIREARMS PROHIBITION—WHICH IS CONSTITUTIONAL AS APPLIED TO APPELLANT—IS NEVERTHELESS A COLLATERAL MATTER BEYOND THE SCOPE OF THIS COURT'S JURISDICTION.

Additional Facts

For the crime of conviction, Appellant faced up a maximum of 15 years of confinement. Based on this fact, the first indorsement to the Entry of Judgement included the following

annotation: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Entry of Judgement*, 27 February 2022, ROT, Vol. 1.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law & Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Appellant was convicted of sexual abuse of a child by communication of indecent language, which is punishable by up to 15 years in prison—thus, he unquestionably falls into this category. MCM, para. 62.d.3(b).

In nevertheless contending that the firearms prohibition is unconstitutional as applied to him, Appellant seeks to capitalize on the fact that he was not convicted of a "violent" offense. (App. Br. at 22.) Appellant now asks this Court to find the firearms prohibition unconstitutional as applied to him and order correction of post-trial paperwork, citing the Government's alleged inability to show that "a lifetime ban is consistent with the Nation's historical tradition of firearms regulation." (App. Br. at 26.)

But as discussed below, Appellant is not entitled to relief—first and foremost, because this nation has long barred the possession of firearms by persons who are not law-abiding, responsible citizens; and second, irrespective of whether the statute is constitutional, this Court lacks jurisdiction to grant any relief.

A. The firearms prohibition is constitutional as applied to Appellant because this nation has a historical tradition of disarming the dangerous.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion).

While the Amendment guarantees "the right of *law-abiding, responsible citizens* to use arms for self-defense," Bruen, 597 U.S. at 26 (emphasis added), the same cannot be said for those who have broken the law. The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added).

For Appellant, therein lies the rub. As someone whose right to possess firearms was restricted as a consequence of his conviction, Appellant is in a fundamentally different position than the law-abiding, non-criminal petitioners in Bruen, Heller, and McDonald.[7] For Appellant—now a felon—falls into a class of "irresponsible persons." Barrett, 423 U.S. at 220. And despite his suggestions to the contrary, the fact that Appellant's crime did not involve physical violence does not absolve him of his sins.

[7] *See* Bruen, 597 U.S. at 8 (where "law-abiding New York residents" challenged a state restriction on carrying a firearm outside the home); Heller, 554 U.S. at 573 (where a policeman challenged the District of Columbia's ban on handgun possession in the home); McDonald, 561 U.S. at 790 (challenging a city ordinance that effectively banned "law-abiding members of the community" from having handguns in the home).

After all, this nation has a historical tradition of disarming not only violent offenders, but also "dangerous persons." In the early days of the republic, the law was frequently used to disarm groups that were considered dangerous, such as British loyalists. *See* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, DUKE LAW SCHOOL PUBLIC & LEGAL THEORY SERIES NO. 2020-80 (2020). This tradition of disarming the dangerous endures today—in part, through the "longstanding prohibitions on the possession of firearms by felons," which the Supreme Court has identified as "presumptively lawful regulatory measures." Heller, 554 U.S. at 626, 627 n.26.

In the modern age, dangerousness cannot be defined by physical violence alone. Thus, it matters little that Appellant's crime did not involve physical violence. As the world has evolved, crime has evolved with it. There are more laws to violate than there were in the Founding Era, more ways to violate them, and more ways to be dangerous as a result. Appellant's own crime is one such example. Child sexual exploitation and abuse via new media technology is "a relatively recent, albeit pernicious, development." United States v. Leonard, 64 M.J. 381, 383 (C.A.A.F. 2007). By virtue of modern technology, Appellant managed to sexually abuse OM from an ocean away and is now a convicted sex offender as a result.

Sex offenders "are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32 (2002). Their risk of recidivism is "frightening and high," Smith, 538 U.S. at 103 (citation omitted), and when they reenter society, "they are much more likely than any other type of offender to be rearrested for a new [sex offense]." McKune, 536 U.S. at 33. For offenders like Appellant, recidivism translates into a continued sexual interest in minors. Consequently, Appellant poses a real threat to our most vulnerable demographic—the children. *See* McKune, 536 U.S. at 32 ("[T]he victims of sexual assault are most often juveniles.").

Appellant may not have used physical violence, but he is a danger to our society nonetheless. Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

B. Irrespective of its constitutionality, the firearms prohibition is a collateral matter outside the scope of this Court's authority under Article 66, UCMJ.

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66(d), UCMJ, provides that this Court "may only act with respect to the findings and sentence as entered into the record under section 860c of this title." 10 U.S.C. § 866(d). It does not authorize this Court to act on the collateral consequences of a conviction, such as the firearms prohibition. This Court has said as much before. In United States v. Lepore, this Court held that the firearms prohibition was a collateral matter outside the scope of this Court's authority under Article 66, UCMJ, and that the Court therefore lacked authority to "direct correction of the 18 U.S.C. § 922 firearms prohibition" on a court-martial order. 81 M.J. at 760-63. In so holding, this Court reasoned that the firearms prohibition "relates to a reporting mechanism external to the UCMJ and Manual for Courts-Martial," and "was not a finding or part of the sentence, nor was it subject to approval by the convening authority." Id. at 763. "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within [this Court's] limited authority under Article 66, UCMJ." Id. This Court recently re-affirmed this position in United States v. Vanzant, where it reiterated that the firearms prohibition was a collateral consequence that was beyond its statutory authority to review. __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. May 28, 2024).

Appellant, for his part, contends that this Court's jurisprudence is "in tension" with our superior court's decision in United States v. Lemire, in which the Court of Appeals for the Armed Forces ordered the Army to delete an annotation regarding sex offender registration from a promulgating order. 82 M.J. 263 n.* (C.A.A.F. 2022) (decision without published opinion). Relying entirely on a 20-word footnote[8] in a summary decision without a published opinion, Appellant insists that the Lemire decision stands for the proposition that CAAF can order correction of administrative errors in post-trial paperwork; that CAAF believes the CCA can address collateral consequences; and that CAAF and the CCAs have the power to address "constitutional errors…even if the Court deems them to be a collateral consequence." (App. Br. at 28.) As in Vanzant, this Court should be "[un]persuaded the CAAF's decision in Lemire gives us cause to revisit or overrule Lepore." 2024 CCA LEXIS 215, at *25. Although Lemire is technically a published decision, it is devoid of substance—it did not call attention to a rule of law or procedure, nor did it analyze why the ordered correction was viable and appropriate in that case. Accordingly, it is not the kind of decision that can be treated as precedent, and this Court should continue to decline to do so. *See* Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.[9]

Citing the 2019 versions of R.C.M. 1101(a)(6) and R.C.M. 1111(b)(3)(F)—which provide for the inclusion of "[a]ny additional information … required under the regulations prescribed by

[8] "It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." Lemire, 82 M.J. at 263 n.*.

[9] "Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities." Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.

the Secretary concerned" in the statement of trial results and entry of judgment, respectively—Appellant also avers that the rules now require the firearms prohibition annotation "by incorporation." (App. Br. at 28.) But what Appellant fails to realize is that annotation by incorporation has *always* been the posture—both under the 2016 rules that governed in Lepore and the 2019 rules that governed Appellant's case. And as this Court held in Vanzant, "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of the findings or sentence." 2024 CCA LEXIS 215, at *24-25.

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Thus, Appellant is not only unentitled to relief, but also powerless to obtain any from this Court at all.

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

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, the Air Force Appellate Defense Division, and civilian appellate defense counsel on 17 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **DOUGLAS M. FOLTS,** United States Air Force, *Appellant.*	)	**APPELLANT'S CONSENT MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF (FIRST) OUT OF TIME** Before Special Panel No. ACM 40322 21 June 2024

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(7) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas Folts hereby moves for an enlargement of time to file his Reply Brief. TSgt Folts requests an enlargement for a period of four days, which will end on **28 June 2024**. The record of trial was docketed with this Court on 24 February 2023. From the date of docketing to the present date, 483 days have elapsed. On the date requested, 490 days will have elapsed.

On 26 February 2022, a general court-martial composed of officer and enlisted members convicted TSgt Folts, contrary to his pleas, of one specification of violating Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 2014.[1, 2] The military judge sentenced TSgt Folts to confinement for 16 days and forfeiture of $3,000.00 per month for six months. R. at 2140. The convening authority took no action on the findings and approved the sentence in its

[1] All citations to the Record are to the verbatim transcript provided by the Government to appellate defense counsel on 21 July 2023 pursuant to this Honorable Court's Order, dated 14 April 2023, and subsequent amendments.

[2] The panel acquitted TSgt Folts of two additional specifications under Article 120b, UCMJ. R. at 2014.

entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt Douglas M. Folts*, dated 8 March 2022.

The record of trial—excluding the combined verbatim transcript—is eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. The record of trial was accompanied by a summarized transcript of 334 pages, but the verbatim transcript is 2,141 pages long. TSgt Folts is not currently confined.

Good Cause Exists to File This Motion Out of Time

On 15 June she sustained a fall and injured her shoulder. She returned home on Monday evening, 17 June 2024, the same day the Government filed its Answer. On Tuesday, Ms. Zimmermann went to an orthopedic doctor who administered an x-ray and diagnosed a

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Undersigned counsel filed this motion at the earliest opportunity after reading the Answer, conferring with each other, and consulting TSgt Folts.

Good Cause Exists to Grant This Motion

Undersigned counsel are cognizant and appreciate that this Court already granted several enlargements of time to file the Appellant's Brief. However, due to her own and her medical conditions

Ms. Zimmermann simply was unable to focus enough since the Government filed its Answer to read and digest the Answer; consult with TSgt Folts and military appellate defense counsel; and research, draft, edit, and submit a cogent Reply Brief. **The Government consents to this Motion.**

Additionally, pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate defense counsel represents multiple clients, both at the trial and appellate levels. She has several cases set for trial and several appeals pending at this Court, the Army Court of Criminal Appeals, and the Court of Appeals for the Armed Forces. Also, she serves as the Reserve Chief Defense Counsel of the Marine Corps. The two matters most impacting her ability to work on TSgt Folts' Reply Brief (in addition to her injury and hospital stay) are below:

1. *United States v. Lt Col DiFalco*: Air Force case, total of six charges (Articles 120b, 134, 133, 120, 120c, 131b) and 17 specifications originally referred to court-martial; litigated the first round of motions 15 April 2024; the second motions hearing was set for 8 July 2024, but on 7 June the Government withdrew and dismissed all charges. Client served a Letter of Reprimand, his response is due 24 June 2024.

2. Ms. Zimmermann was on orders from to conduct a Marine Corps special project; she interviewed 15 witnesses and is now preparing her report, due 30 June 2024.

Military appellate defense counsel is assigned 26 cases; 22 cases are pending before this Court (19 are pending AOEs) and four cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). TSgt Folts' case is military appellate defense counsel's first priority. Military appellate defense counsel has reviewed the Answer Brief and begun drafting two parts of the Reply Brief after being able to confer with civilian appellate defense counsel.

TSgt Folts was advised of his right to a timely appeal and of the request for this enlargement of time. TSgt Folts has provided limited consent to disclose a confidential communication with counsel wherein he affirmatively consented to the request for this enlargement of time.

TSgt Folts respectfully requests that this Honorable Court grant the requested enlargement of time.

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 Air Force Government Trial and Appellate Operations on 21 June 2024.

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No. ACM 40322

IN THE
UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

TECHNICAL SERGEANT (E-6)
DOUGLAS M. FOLTS,
U.S. Air Force,
Appellant

REPLY BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force, *Appellant.*	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40322 Filed on: 28 June 2024

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

Appellant, Technical Sergeant (TSgt) Douglas M. Folts, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer Brief of 17 June 2024 [hereinafter Ans.]. TSgt Folts stands on the arguments in his initial brief, filed on 16 May 2024 [hereinafter AOE], and respectfully submits the following additional arguments.

Argument

Preliminarily, the Government argues for the first time in this case the Court lacks jurisdiction. Ans. at 2. As the Government acknowledges, this argument is foreclosed by a published opinion from this Court. *Id.* (citing *United States v. Vanzant*, No. ACM. 22004, __ M.J. __, 2024 CCA LEXIS 215, at *23-25 (A.F. Ct. Crim. App. May 28, 2024).[1]

[1] Further, the Government did not file any motion to dismiss or otherwise object to the Court's jurisdiction in the 16 months since this case was docketed on 24 February 2023.

I.
THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THE LANGUAGE COMMUNICATED (THE MEMES) WAS INDECENT OR COMMUNICATED WITH CRIMINAL INTENT.

The Government agrees to three basic principles:

1. Indecent language under Article 120b(c), Uniform Code of Military Justice (UCMJ), requires an intent to incite lustful thought. Ans. at 11-12.

2. Context matters. Ans. at 12-13, 15.

3. This Court and our higher Court have held indecency is equivalent to obscenity. Ans. at 10.

The Government attempts to escape the *Miller*[2] requirements for the definition of obscenity[3] by arguing the Court does not have to find the memes themselves indecent, but rather only whether the sending of the memes was indecent. Ans. at 10. Obscenity and the proper definition of "indecent" is discussed last herein, but under *any definition*, the evidence is insufficient for two reasons: the memes do not incite lustful thought and TSgt Folts did not send them to gratify his sexual desire. The memes were nothing more than jokes a stepfather sent to his stepdaughter, consistent with the tone and tenor of their relationship. The memes themselves do not incite lustful thought. They might cause the recipient who views them to think, "Wow, that's funny." Or, "Wow, that's clever." Or, "Wow, that's gross." Or maybe even, "Wow, that's pretty mature subject matter to send to a teenager." But these memes do not depict anything that remotely makes the recipient think, "Wow, that makes me feel like engaging in sexual activity right now." They simply do not appeal to the prurient interest or, colloquially, incite lustful

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[2] *Miller v. California*, 413 U.S. 15, 24 (1973).

[3] Discussed *infra*.

thought,[4] in a patently offensive way, as they must in order to meet the definition of indecent. *See infra* at I.C (discussing last, in detail, the First Amendment issue in this case). There is also no indication from context or the credible evidence presented that TSgt Folts sent these memes to gratify his sexual desire.

This Court has an independent obligation to ensure TSgt Folts' conviction is legally and factually sufficient. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citation omitted). This is particularly critical in cases of inconsistent verdicts, which, based on the Government's theory on appeal, is what occurred here. Specifically, if the panel believed OM's testimony – the evidence upon which the Government exclusively relies on for the issue of intent[5] – the members would have convicted him of the other alleged conduct where sexual interest was demonstrated through acts and words OM testified happened. But the members did *not* convict him. *See also United States v. Powell*, 469 U.S. 57, 67 (1984) ("[A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by . . . appellate courts."). Upon independent, impartial review, it is apparent TSgt Folts' conviction is legally and factually insufficient.

A. The Memes Are Consistent with the Joking and Supportive Nature of the Relationship.

Nothing surrounding the memes indicates (1) the memes were calculated to incite lustful thought or (2) TSgt Folts sent the memes with an intent to gratify his sexual desire. TSgt Folts had

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[4] These terms mean the same thing. *Prurient*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prurient ("marked by or arousing an immoderate or unwholesome interest or desire *especially***:** marked by, arousing, or appealing to sexual desire").

[5] Ans. at 7, 16.

a close relationship with his stepdaughter where she would often confide in him about personal things – and sexual matters – even before she would tell her own mother. R. at 1408. She joked about being pregnant with him and he joked back. Pros. Ex. 37-38; Def. Ex. H at 1-2. *She* asked *him* about masturbation and vibrators when her friends brought those topics up. R. at 1409. She discussed the possibility of TSgt Folts and her mom taking OM to get her own vibrator. *Id*. She openly discussed her relationship with her girlfriend with TSgt Folts, whether she was asked by him or unprompted. Pros. Ex. 5 at 7-8, 11, 23. The fight that predicated OM reporting the charged conduct was about her telling TSgt Folts and her mom about how people at school were saying she would go out with anyone, that she was a "hoe" and a "thot." Pros. Ex. 2 at 1-2; R at 1422-24. From just these few examples, talking about sex and sexual topics was normal in their relationship. In this context, TSgt Folts joking about sex or asking her about her relationship is not language intended to express sexual interest or incite lustful thought in anyone. Instead, it is "the behavior of a parent who is curious about his stepdaughter's happiness [and] concerned about safe sex practices." Ans. at 14. None of the language the Government relies on was patently or grossly offensive because it was not "calculated to . . . titillate."[6, 7]

OM claims she was "disgusted," "unamused," "confused," and "weirded out" throughout the various conversations the Government points to, but the conversations paint a different picture. She laughs at the garlic bread meme, which the Government ignored on appeal and at trial despite highlighting it on opening and closing slides. Pros. Ex. 5 at 5 ("Hehehe."); App. Ex. LII at 1;

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[6] *United States v. Hullett*, 40 M.J. 189, 192 (C.A.A.F. 1994) (analyzing whether the purpose of the language at issue was "calculated to offend, shock, or titillate").

[7] "Shock" and "offend" are eliminated because Article 120b(c), UCMJ, only covers licentious acts, unlike Article 134, UCMJ, which can cover all three. *United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020).

App. Ex. LXIII at 2. With the fish meme, TSgt Folts starts out by saying, "Try not to laugh," followed by, "You didn't laugh? I woke up lovey [sic][8] laughing at this," context clues the Government also ignores. *Id*. at 10. With the sperm conversation, OM's first response is "Omg I know," meaning, "oh my god I know it looks like sperm." *Id*. at 19. After that acknowledgement, TSgt Folts teases her, and she says, "I hate you," followed by "Ahhaha I laugh at your sadness," indicating the teasing and joking nature of the conversation. *Id*. at 20. Finally, after the three memes at issue, TSgt Folts, at about 5:00 PM[9] his time, sends two more, one of which OM laughs at. *Id*. at 41. None of these are "titillating" discussions, but merely jokes between a stepfather and stepdaughter. The joking nature of their relationship is further supported by the conversation on Skype where they exchange 20 memes between each other in the span of 20 minutes. Pros. Ex. 5 at 14-15 ("Got anymore pictures or memes? I needs moar. (sic)"). Add this joking context to their overall relationship, and it becomes clear nothing about their conversations is calculated to incite lustful thought.

This context and situation are comparable to the facts in *Hullett*, where the accused made sexual comments to a fellow co-worker as a joke. The record established sex jokes were commonplace in the unit and that the relationship between appellant and his message recipient was "friendly, unofficial," and they regularly talked about personal matters. *Hullett*, 40 M.J. at 190-

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[8] It is unclear what "lovey" is supposed to be, but in context, it reads like a typographical error, possibly "literally."

[9] Ramstein, Germany, is ten hours ahead of Alaska Daylight time, the time zone Joint Base Elmendorf-Richardson, Alaska, is in. As this is a readily verifiable fact, TSgt Folts requests this Court take judicial notice on the time difference. *United States v. Paul*, 73 M.J. 274, 278 (C.A.A.F. 2014) ("[C]ase law is well settled that both military and civilian appellate courts may take judicial notice of indisputable facts."). The Government's argument that these conversations were happening at 2:00 AM is incorrect. Considering these conversations in the correct time zone, there is nothing nefarious about the timing, especially when it appears OM checks her phone randomly at night. *See, e.g.*, Pros. Ex. 5 at 6 ("I woke up to go pee and turned on my phone . . . .").

92. The Court found the appellant's sexual comment, "if [you] gave [me] a chance, [I'd] make [your] eyes roll in the back of [your] head and [your] toes curl under," was *not indecent* because it was conveyed as a joke—and *even if the appellant was serious*, it was unclear what he meant, whether he was bragging about "sexual prowess" or expressing a desire for a sexual relationship. *Id*. While not directly stated, the lack of clarity highlights the comments were not *grossly* indecent, the required standard.

Here, similarly, context reveals the language between OM and TSgt Folts was personal and anchored in humor, not calculated to "incite lustful thought." OM talks to TSgt Folts about her friends, who is interested in who, and who is dating whom. Pros. Ex. 5 at 1-3, 7, 31. She asks for relationship advice. *Id*. at 29-30 (asking what she can do if she does not want to do "naked stuff" with her girlfriend). She has an open relationship with her stepfather that provides context to the memes as nothing more than jokes; they do not appeal to the prurient interest, they do not incite lustful thought, they are, as stated before, quite obviously sex *jokes*.

None of the language immediately surrounding the memes shows a goal of inciting lustful thought. The only conversation the Government can point to is the garlic bread meme, which was accompanied by TSgt Folts saying he thought OM and her girlfriend would "appreciate this." Pros. Ex. 5 at 5. What "appreciate" means is unclear, but the strongest interpretation is that it is amusing, especially since *OM laughed at it*. *Id*. Even though the memes and some of their conversations contain sexual topics, like in *Hullett,* that is not enough to prove a tendency to incite lustful thought. Even if it is unclear what TSgt Folts meant by sending the memes, to include the garlic bread meme, the lack of clarity cuts against all three of these memes being *patently, grossly, or obviously* offensive because of the lack of clarity surrounding any tendency to appeal to sexual desire or incite lustful thoughts. This is what the Government ignores. The language has to be *flagrantly*

offensive in its appeal to the prurient interest, or tendency to incite lustful thought, and none of these conversations go beyond basic sex references or sex jokes.

Cases like *United States v. Green,* 68 M.J. 266 (C.A.A.F. 2010), and *United States v. Knarr*, 80 M.J. 522 (A.F. Ct. Crim. App. 2020), are unhelpful in analyzing whether TSgt Folts' conduct was obscene. *Green* simply does not apply, because it involves analysis of language which is "grossly offensive to modesty, decency, or propriety . . . because of its vulgar, filthy, or disgusting nature." This is the other standard under Article 134, UCMJ, that is not captured in Article 120b(c), UCMJ. *Avery*, 79 M.J. at 368. Further, the accused in *Green* was making *flagrant* sexual advances: "I could fuck you real good;" pulling down the female victim's shirt; and pushing his erection against the female victim's buttocks. This is all *grossly* (i.e., obvious, flagrant, glaring, monstrous) offensive behavior in the workplace with an acquaintance co-worker. TSgt Folts' conduct is not even comparable. Like in *Hullett*, the innocuous discussion about OM's relationship does not reveal obvious lustful purpose or calculated prurient desire. Then the memes themselves, even if involving sexually-related topics, are not obviously lustful or calculated to be. They were calculated to be funny in line with the previous relationship between TSgt Folts and OM.

The Government's reliance on *Knarr* has the same problem. That accused made *flagrant* sexual overtures preceding the charged language, thereby turning "publicly available lyrics from a commercially released song by a well-known recording artist"[10] into a continuation of expressed sexual desires. TSgt Folts *never* expressed sexual interest in OM—before or after the memes were sent. Again, while OM testified he did, the members soundly rejected this testimony, likely because it was inconsistent with other evidence, and she had unabashedly committed perjury in

[10] Ans. at 13.

this very case. The Government equates *Knarr* asking "Ella" how she masturbated with TSgt Folts asking OM about whether she kissed her girlfriend and other non-sexual topics.[11] To be clear, in *Knarr*, the accused did the following:

> Appellant asked "Ella" whether and how she masturbated; told "Ella" that he wanted to have sexual intercourse with her, and described his fantasies about doing so; speculated about where he would ejaculate when they engaged in sex; and persistently urged her to send him naked photos of herself.

Knarr, 80 M.J. at 527. Additionally, shortly after the otherwise "innocuous" lyrics were sent, the accused in *Knarr* agreed this is what he wanted "Ella" to do and he "wanted to see [her] naked," for her to "be bad" for him, "take naughty pictures," and "do it for [him]." *Id*. at 531. Asking "Ella" if she masturbated *alone* or sending these sexual lyrics *alone* may not be enough to arise to indecent, but coupled with all the other things this appellant did, this appellant *obviously* was engaging in conversation to incite lustful thought or appeal to the prurient interest. He described sexual fantasies, which included where he would ejaculate if he had sex with "Ella." *Id*. at 527. Expressing sexual fantasies with a child to that child and telling that child to take naughty pictures for him is calculated to appeal to the prurient interest or excite lustful thought—and indicates an intent to gratify sexual desire. TSgt Folts did *nothing* comparable to this. It is uncontroverted that there is no language surrounding the memes demonstrating the memes are calculated to incite lustful thought.

The Government harps on the "references to sex" made by TSgt Folts over "months" and how those references reveal the memes were intended to incite lustful thought. Ans. at 13-14. The mere fact sex came up in conversation is not enough to make a conversation obscene; the language must be calculated to incite lustful thought. *See, e.g., Hullett*, 40 M.J. at 192 (finding that even if

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[11] Ans. at 13-14.

a request for sexual intercourse was made, it was not indecent because it did not have a qualifying purpose—to corrupt morals or excite libidinous thoughts); *United States v. White*, No. ACM 39917 (f rev), 2022 CCA LEXIS 344, *35 (A.F. Ct. Crim. App. Jun. 10, 2022) ("[A]ny discussion of erogenous parts of the body might tend to incite lustful thought, but there is no indication such was intended or occurred here . . . ."). Otherwise, every parent's conversation with their child about sex and sexuality would be obscene. Talking about sex, sexuality, and about how OM is attractive was all *in the context of her new and struggling relationship*. These conversations are not obscene because there is nothing lustful about them. They also do not support a finding that TSgt Folts had the requisite intent due to their innocuous nature and context.

Significantly, the Government failed to present any expert testimony at trial or on appeal, yet now claims the messages between OM and TSgt Folts are "textbook grooming behavior." Ans. at 14. The messages do not depict "grooming." None of these conversations involve TSgt Folts showing any sexual interest in OM. Instead, these are just conversations about sex between a supportive stepfather and his stepdaughter, who sought his counsel about her new and different feelings and experiences.

The Government put significant weight on the conversation between TSgt Folts and OM about her relationship because it is the first of only two evidentiary items the Government can argue to show the purpose of the memes. In context, nothing about this conversation demonstrates a tendency to incite lustful thought. TSgt Folts is asking his stepdaughter to tell him about her new relationship, asking for details to show support, not lustful interest. This is not a fantasy between the two of them; this is not TSgt Folts swapping OM's girlfriend for himself; this is not TSgt Folts getting aroused by OM's descriptions or TSgt Folts trying to get OM aroused by discussing these topics. The conversations are just not what the Government claims them to be.

No rational trier of fact would conclude these memes are obscene, and this Court cannot be convinced for itself the memes are obscene.

B. Credible Evidence Is Completely Lacking as to Mens Rea.

There is no credible evidence TSgt Folts sent the memes with an intent to incite lustful thought. The Government struggles to find evidence in the record to support the theory that TSgt Folts was sexually interested in OM, which reveals the weakness of the case and the lack of evidence.

1. The Government Improperly Relies on Certain Evidence to Support Criminal Intent.

The second evidentiary item Government relies upon on appeal is "evidence" TSgt Folts made certain inappropriate comments to OM and touched her inner thigh during her visit to Alaska in July 2020. Ans. at 7, 16. The Government charged TSgt Folts with sexual abuse of a child based on two comments he allegedly made (expressing desires to engage in a "threesome" with OM and her mother and take OM up to his bedroom) and the alleged inner thigh touching. Record of Trial (ROT), Vol. 1, *Charge Sheet* (Specifications 1 and 2 of the Charge). The members acquitted on these specifications. R. at 2014. The Government on appeal relies on other comments TSgt Folts allegedly made, offered at trial under Military Rule of Evidence (Mil. R. Evid.) 404(b). App. Ex. LXIV. Controlling precedent prohibits this Court's consideration of acquitted conduct in conducting its sufficiency review. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citations omitted). The remainder of the Mil. R. Evid. 404(b) evidence is insufficiently credible to support the intent element.

i. It is improper to consider the acquitted conduct.

The CAAF held, "This Court has held that a military court of criminal appeals, in the course of its review process, cannot find as fact any allegations of which the accused was found not guilty

at trial. The CCA cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *Rosario*, 76 M.J. at 117 (cleaned up). The members acquitted TSgt Folts of touching OM's inner thigh and telling her he wanted to have a threesome with her and her mother and take her to his bedroom. R. at 2014. While the Court arguably can consider other facts related to the acquitted specifications, such as surrounding circumstances, those discrete acts were charged and acquitted and thus "excepted by the trier of fact." *Id.* at 118. For example, the CAAF found it was proper to consider the underlying facts such as that an accused had forced his way into the victim's apartment one night in determining whether he had committed the charged offense of stalking, even though he was acquitted of raping the victim on that occasion. *United States v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2014). As stated above, the touching of OM's inner thigh and "threesome"/bedroom comments all were charged as independent offenses and rejected by the members. Thus, it is inappropriate for the Government to rely on them and for this Court to consider them on the issue of TSgt Folts' intent.[12]

ii. Any remaining Mil. R. Evid. 404(b) evidence lacks any serious probative value.

Assuming the Court can[13] consider the remaining evidence, it should not. The uncharged misconduct evidence is insufficient to provide the required indicia that TSgt Folts sent the memes

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[12] As noted earlier, it also makes logical sense that this is not reliable evidence. If the panel found TSgt Folts touched OM, based on her testimony, there is no reason to be touching her that way *but for* sexual gratification. Same with the comments. The intent element, per OM's testimony, is intrinsically intertwined with the act; they either both exist or they both do not exist. The members would have found him guilty if they believed the acts happened. Clearly, they thought neither event occurred. Consequently, for this particular case, using this evidence would be equivalent to arguing the acquitted conduct supports the conviction, in violation of *Rosario.*

[13] Notably, there was no Mil. R. Evid. 404(b) instruction in this case. It was affirmatively waived by defense counsel, who noted that *if* the Government had argued burdens of proof (i.e., if you think he said those comments more likely than not or if you do not find he committed the charged offenses but think he more likely than not did the conduct), the defense would have requested the instruction. R. at 1898-1900. The Government did not argue that theory at trial for

with an intent to gratify his sexual desires, as charged. All the Mil. R. Evid. 404(b) evidence involved events that took place in July 2020, several months *after* the memes were sent in March 2020. This temporal delay – and sequence – drastically diminish the probative value of the uncharged misconduct evidence. Further, the evidence came exclusively from OM, was uncorroborated, and was completely inconsistent with other evidence such as the photographs depicting OM seeking TSgt Folts' attention during the trip and having a good time (contrary to her testimony), and TSgt Folts' solid character for being a peaceful and non-violent person and a good parent. *See, e.g.,* Def. Ex. H-M; R. at 1404-21, 1815-16, 1825, 1832-33. Also, it bears repeating: *OM lied under oath to the trial counsel, defense counsel, the military judge, and even the members in this very case*. R. at 1257-1285 (in particular, R. at 1260,[14] 1274-75). The evidence is simply not believable and cannot support an inference that TSgt Folts sent the memes with intent to gratify his sexual desire.

It is important to note that the Government elicited this evidence from OM at trial, but did not mention it once in closing argument as supporting TSgt Folts' intent. R. at 1890-94. Instead, trial counsel argued only the memes themselves were the proof of such intent: "they're evidence of the accused's intent to gratify his sexual desire because sending them, knowing that she had to look at them, view them, and to mentally digest the content gratifies the accused's sexual desire, because in this context, in the context of what they said, the messages that you have, there's no

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any piece of evidence, or ask for the panel to convict under that theory when it came to the possibility of using the charged offenses under *United States v. Hyppolite,* 79 M.J. 161 (C.A.A.F. 2019). The panel was not instructed they could use the evidence in that manner, either. By using the acquitted conduct though now, the Government is essentially changing strategy on appeal to argue exactly that.

[14] *Compare* R. at 1260 *with* R. at 1556 – OM is unwilling to admit her friends call her "Liv" but her best friend, J.F, testified they do.

other way to interpret them." R. at 1893. The new strategy on appeal adds to the unbelievability of OM's testimony, while also highlighting the weakness of the Government's case.[15]

2. Nobody Who Saw the Memes Prior to AFOSI Thought TSgt Folts Sent Them for Any Reason Other Than to Be Funny.

OM and her active duty Air Force father saw the memes at issue long before AFOSI got them. Neither of them gave it a second thought. OM explicitly testified it was her understanding they were intended as jokes to be funny. R. at 1397. That makes sense, because the memes themselves are not of a nature to incite lustful thought but rather, humor. While not dispositive, this fact should carry great weight with this Court. The Government completely failed to address this important fact in its Answer.

No rational finder of fact could find TSgt Folts had the requisite mens rea to commit the offense of conviction. This Court should have a reasonable doubt about whether TSgt Folts sent the memes with criminal intent when an impartial review of the evidence reveals they were meant to be, and sent with the intent to be, funny.

C. "Indecent Language" under the UCMJ is Either "Obscenity" or it is Protected Speech.

Under any definition of "indecent," TSgt Folts prevails, but there is a glaring constitutional problem in this case that cannot be ignored: "indecent language" is not its own category of unprotected speech, as the Government argues. Ans. at 10 n.4, 12. It is either equivalent to obscenity, a historical category of unprotected speech, or it is protected speech that if criminalized, must pass strict scrutiny. The Government confuses these concepts and creates a new category of unprotected speech without any supporting case law.

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[15] *See also supra* footnote 12.

Under the Constitution, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Consequently, Article 120b(c), UCMJ, communicating "indecent language," is presumptively unconstitutional because it is a restriction on expression due to the speech's subject matter or content: language which is "grossly offensive because of its tendency to incite lustful thought." *Avery*, 79 M.J. at 368 (citation omitted) (internal quotation marks omitted).

Despite the Constitution's unequivocal mandate on restricting speech, "from 1791 to the present, the First Amendment has permitted restrictions upon the content of speech in a few limited areas." *Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (cleaned up). As recently as last year, the Supreme Court reaffirmed this "categorical approach" to the First Amendment. *Id*. The "permitted restrictions" are "historic and traditional categories . . . long familiar to the bar and perhaps, too, the general public." *Id*. These categories include incitement, fraud, true threats, defamation, speech integral to criminal conduct (like conspiracy and solicitation), and, as relevant here, obscenity. *Id.* at 73-74; *United States v. Stevens*, 559 U.S. 460, 468-469 (2010).

If this Court were to read only the *caselaw* the Government cites, it would see "indecent language" is "obscenity." The Government cites the *exact* same caselaw as TSgt Folts, coming to the *exact same conclusion*: indecent language is that which is grossly offensive because it tends to incite lustful thought. Ans. at 12. The Government also highlights "mundane language can be rendered indecent by virtue of who it is communicated to and community standards about what that language might mean." Ans. at 15. Putting both legal principles together, this is the definition

of obscenity (or close to it)[16]. AOE at 10. This is consistent with this Court's precedent,[17] the CAAF's precedent, and the UCMJ's definitions of indecent, both of which repeatedly state, indecency is equivalent to obscenity. AOE at 9-10.

Yet, the Government argues "indecent language" is not obscenity. Ans. at 10-12. It argues "indecent language—*like obscene speech*—is not afforded constitutional protection," citing *United States v. Moore*, 38 M.J. 490, 492 (C.A.A.F. 1994). Ans. at 10. But *Moore* says the exact opposite: "indecent is synonymous with obscene, and such language is not afforded constitutional protection," because *"obscenity* is not within the right to speech guaranteed by the First Amendment." *Moore*, 38 M.J. at 492 (emphasis added). As such, even by the Government's own citations, the definition provided by the UCMJ is legally equivalent to obscenity. Obscenity is a high and exacting standard, though, which means for "indecent language" to be wholly unprotected, it must be obscene by the standards set out in *Miller*. The language at issue here simply does not meet that standard.

Taking the Government's argument at face value, though, it is conceding Article 120b(c), UCMJ, is presumptively unconstitutional because it does not regulate an unprotected category of speech, i.e., obscenity. *Unlike obscenity*, "indecent language" is not an unprotected category of speech; it is simply not one of the categories long known to the bar. *Counterman*, 600 U.S. at 73-74; *see also Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment . . . ."). And neither Congress nor the Government can simply add categories through some sort of ad hoc balancing of

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16 *See infra* Issue II.

17 *See e.g.*, *White*, 2022 CCA LEXIS 344, at *22-23 (identifying *Miller*, 413 U.S. at 24, as the controlling test).

the value of the speech when all of these categories have undergone Supreme Court analysis and been declared "unprotected." *See Stevens*, 559 U.S. at 470-72 (explaining how categories of unprotected speech have arisen and rejecting the Government's attempt to create a new one based on a "simple cost-benefit analysis").

However, the Government insists, despite clear case law to the contrary, indecent is not equivalent to obscene. If that is true, the Government must prove, as applied, Article 120b(c), UCMJ, is constitutional under *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008). The CAAF recently held this to be the correct analysis and standard: "We interpret *Wilcox* to require the Government to prove a direct and palpable connection to the military mission or environment not only *when it is clear that the First Amendment would protect speech in a civilian context*, but also in cases, as here, where a court cannot determine whether the speech would be protected." *United States v. Grijalva*, No. 23-0215, slip op. at 11 (C.A.A.F. Jun. 26, 2024) (emphasis added). The CAAF is unequivocal: not just in Article 134, UCMJ, cases but *when the First Amendment is implicated because speech is protected in a civilian context, Wilcox* applies. "Sexual expression which is *indecent* but *not obscene* is protected by the First Amendment . . . ." *Sable Communications*, 492 U.S. at 126. The Government has not proven Article 120b(c), UCMJ, as applied,[18] is constitutional under *Wilcox*; in fact, the Government did not even bother to address its burden of showing a direct and palpable connection between the speech and the military mission or military environment. *Wilcox*, 66 M.J. at 448-49. This is understandable considering the Government would fail in meeting its burden even if it tried because there is no evidence in the record showing TSgt Folts' speech had any impact on the military mission or military environment.

[18] In light of the Government's argument on Issues I and II, TSgt Folts raises a facial challenge to Article 120b(c), UCMJ, too. *See infra* Issue II.

In electing not to address its burden and arguing indecent language is not equivalent to obscenity, the Government would force this Court to find for TSgt Folts because, pursuant to *Wilcox*, when there is no nexus to the military mission, Article 120b(c), UCMJ, cannot constitutionally criminalize speech.

Setting the Government's concession aside and assuming "indecent" means "obscene" as the CAAF has found, under the test in *Miller*, for material to be obscene, the speech defined under the law must be "patently offensive" and appeal to the "prurient interest." *Miller*, 413 U.S. at 24; *see also United States v. Rudzavice*, 586 F.3d 310, 315 (5th Cir. 2009) (acknowledging that federal courts incorporate the *Miller* test "into federal obscenity statutes in order to construe them in a manner consistent with the Constitution."). For Article 120b(c), UCMJ, "patently offensive" appears[19] to be captured in the "grossly offensive" requirement. "Grossly . . . is a word suggestive of language with an *extreme meaning or purpose*. At its root, the word gross is synonymous with *glaring*, *flagrant*, or *monstrous*." *United States v. Avery*, No. ARMY 20140202, 2017 CCA LEXIS 739, at *23 (A. Ct. Crim. App. 30 Nov. 2017) (unpub. op.) (footnotes and quotation marks omitted) (emphasis added), *aff'd*, 79 M.J. 363 (C.A.A.F. 2020). Based on precedent and previous applications of "grossly," the language at issue should be obviously offensive by its tendency to incite lustful thought.[20] Here, there is no patent, extreme, glaring, flagrant, or monstrous offensive purpose to these memes and *any* of the language surrounding them because they do not incite lustful thought at all. TSgt Folts' only "crime" was his arguably childish way of communicating

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19 *See infra* Issue II.

20 *See infra* Issue II (noting if "indecent" is "obscene" then "grossly" is not being properly applied under *Miller* because it is untethered from a fact to be proven as specifically defined by law).

with his teenage stepdaughter, a pattern of behavior that was reciprocated by OM. *See, e.g.*, Pros. Ex. 2 at 1 ("You tell sexual jokes.").

D. Conclusion.

The memes are not indecent. TSgt Folts did not send the memes to OM with an intent to satisfy his sexual desire, as charged. This Court should find the evidence legally and factually insufficient and set aside the findings and the sentence.

II.
TSGT FOLTS DID NOT HAVE FAIR NOTICE THAT SENDING THE THREE MEMES CONSTITUTED SEXUAL ABUSE OF A CHILD.

A. The Government's Response That "Indecent" Is Not "Obscene" Triggers a Facial Challenge to Article 120b(c), UCMJ.

A criminal provision is vague when "no standard of conduct is specified at all." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). As the Government points out, this is when "it is unclear *what* fact must be proved." Ans. at 20 (citing *FCC v. Fox TV Stations, Inc*., 567 U.S. 239, 253 (2012) (emphasis added)). The Government argued that "indecent language" was not "vague" or "void for vagueness," but in doing so, analyzes the definition of indecent, the same definition it applies to its legal and factual sufficiency analysis. Ans. 20-24.

Seeing how TSgt Folts disagrees with the Government on what the law is in the sufficiency application illuminated the underlying fair notice problem more clearly: Article 120b(c), UCMJ, is facially vague and overbroad[21] by criminalizing "indecent language," which has no definition whatsoever. 10 U.S.C. § 920b(h)(5)(C). Only by reading in "obscenity" is "indecent" given some

[21] Vagueness and overbreadth under the First Amendment are closely related. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972) (discussing the two doctrines). TSgt Folts preserves a facial challenge to the section of Article 120b(c), UCMJ, covering "indecent language" under both theories.

clarity but not enough to comport with the First Amendment. Article 120b(c), UCMJ, "indecent language" is missing the requirements of obscenity under *Miller* to such a degree this portion of the statute is void for vagueness and overbroad. And, if "indecent" does not mean "obscene," then TSgt Folts wins under *Wilcox. Grijalva*, No. 23-0215, slip op. at 11.

B. Article 120b(c), UCMJ, "Indecent Language" Is Void for Vagueness because "It Is Unclear *What Fact* Must Be Proved"[22] when the Standard for Obscenity is Being Applied.

The Government makes much ado about how the Manual for Courts-Martial's (MCM's) definition of indecent—which is not even provided in defining "indecent language" under the relevant part of Article 120b(c), UCMJ—means the statute provides sufficient notice. However, "indecent" under the MCM is not the standard. As described above and in the AOE, the CAAF has found indecent is equivalent to obscene. The CAAF and this Court have continuously cited *Miller* or its predecessor, *Roth*,[23] when making this determination, highlighting that *obscenity* is what is criminalized when "indecent" is at issue. *See, e.g., United States v. Meakin,* 78 M.J. 396, 401 (C.A.A.F. 2019) (citing *Moore*, 38 M.J. at 492 citing *Roth*); *White*, No. ACM 39917 (f rev), 2022 CCA LEXIS 344, at *22-23 (citing *Miller*). However, no military appellate court has faithfully applied the *Miller* test as required[24] when analyzing speech under Article 120b(c), UCMJ, because every analysis is missing two prongs of the *Miller* test.[25]

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22 *Fox TV Stations, Inc.*, 567 U.S. at 253 (emphasis added).

23 *Roth v. United States*, 354 U.S. 476 (1957).

24 *Rudzavice*, 586 F.3d at 315.

25 Part of the problem may be that *Roth,* which some of the earlier cases cite as to what is "obscene," is only part of the later adopted *Miller* test. *Miller*, 413 U.S. at 24. But, as this Court noted in *Knarr*, the CAAF continues to say "indecent" is equal to "obscene." "Obscene," as a category of unprotected speech, is no longer defined by *Roth,* but by *Miller*:

The first missing prong is *what* is "patently offensive," or "grossly offensive." *Miller*, 413 U.S. at 24. "Grossly offensive," which is comparable to "patently offensive" under *Miller*, is untethered from any *fact* to be proven. This is clear when attempting to discern *what* is supposed to be "grossly offensive" under "indecent language" for Article 120b(c), UCMJ. The language has to appeal to the prurient interest, but, under *Miller*, it also has to depict or describe, "in a patently offensive way, sexual conduct specifically defined by the applicable . . . law." *Miller*, 413 U.S. at 24. In *Miller*, the Supreme Court provided some "plain examples" of sexual conduct a statute could define for regulation:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller, 413 U.S. at 25.

Under the "indecent language" provision of Article 120b(c), UCMJ, there is no "sexual conduct" requirement, and there is nothing "specifically defined by law." Instead, the language is "grossly offensive . . . *because* its tendency to incite lustful thought." *Avery*, 79 M.J. at 368 (emphasis added). To be clear, the definition read into "indecent language" in 10 U.S.C. § 920b(h)(5)(C) is *not* testing whether *what* "incites lustful thought" *is* patently offensive. Instead, something *is* "grossly offensive" *because* it incites lustful thought. *Avery,* 79 M.J. at 368. These

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> State statutes designed to regulate obscene materials must be carefully limited. We now confine the permissible scope of such regulation to *works which depict or describe sexual conduct*. That *conduct must be specifically defined* by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (internal citations omitted) (emphasis added).

conclusions are not independent, as in *Miller*, they are dependent, which is not the correct application of the *Miller* test. With no application of "grossly offensive" to a specified fact defined by the law, a vagueness problem comparable to that in *Reno v. ACLU,* 521 U.S. 844 (1997), emerges.

In *Reno*, the Supreme Court found the portion of the Communications Decency Act (CDA) on "patently offensive" communications vague[26] for three reasons. First, the term "patently offensive" was uncertain and omitted a "critical requirement": "that the proscribed material be 'specifically defined by the applicable . . . law.' This requirement reduced the vagueness inherent in the open-ended term 'patently offensive.'" *Reno*, 521 U.S. at 871-73. Second, this portion of the CDA did not comply with *Miller's* "sexual conduct" limitation, instead extending to "excretory activities" and "organs of both a sexual and excretory nature." *Id*. at 873. Third, this section also omitted the last prong of the *Miller* test entirely: "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id*.; *Miller,* 413 U.S. at 24. This "requirement is particularly important because, unlike the 'patently offensive' and 'prurient interest' criteria, it is not judged by contemporary community standards." *Reno*, 521 U.S. at 873. The "societal value" requirement, absent in relevant portion of the CDA, "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." *Id*. Each prong of the *Miller* test "critically limits the uncertain sweep

[26] "Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. . . . The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute." *Reno,* 521 U.S. at 874. The "indecent language" definition of Article 120b(c), UCMJ, can be more carefully drafted; it can comply with *Miller* (becoming unprotected speech) or it can comply with *Wilcox* (protected speech with a military nexus).

of the obscenity definition." *Id*. The Supreme Court determined that by missing all three of these *Miller* requirements the provision was vague—and overbroad.

Article 120b(c), UCMJ, "indecent language" has the same flaws as the CDA, to include the omission of the third prong of the *Miller* test. No where is there a "societal value" determination, even one tailored to minors. This means two things. First, "indecent" under Article 120b(c), UCMJ, is not actually equivalent to obscenity; *Miller* does not apply—but then, if true, Article 120b(c), UCMJ, regulates protected speech. As already discussed, if true, Article 120b(c), UCMJ, "indecent language" is presumptively unconstitutional because it regulates content, unless it passes *Wilcox*. *Wilcox* is not met here. *See* AOE at 11-12.

Second, the UCMJ's definition of "indecent" read into 10 U.S.C. § 920b(h)(5)(C) provides insufficient notice of what is criminalized because it does not comport with *Miller*. Precedent tells this Court "indecent" means "obscene," yet obscenity has three parts, only one of which is clearly present in the UCMJ definition of "indecent;" a tendency to incite lustful thought is comparable to appealing to the prurient interest. Article 120b(c), UCMJ, "indecent language" is missing the specificity required by *Miller* that was fatal to the CDA in *Reno*. *What fact* must be proven to meet the second *Miller* prong is unknown and unclear. Additionally, there is no objective third prong whatsoever. The omission of this "particularly important" requirement coupled with the lack of specificity results in the same finding as *Reno*: Article 120b(c), UCMJ, "indecent language" is vague and overbroad, and it is *void* for vagueness here because "it fails to give ordinary people fair notice of the conduct it punishes"[27] based on how it is written and has been interpreted by

[27] *Johnson v. United States*, 576 U.S. 591, 595 (2015).

attempted incorporation of *Miller*. Consequently, this Court should find TSgt Folts did not have fair notice.

III.
AS APPLIED TO TSGT FOLTS, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[28] WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

The Government argues there is a long-standing tradition of disarming those who are not law-abiding or who are "irresponsible." Ans. at 26. The Government appears to agree that there is a historical tradition of disarming "violent" offenders, but then lumps into that history and tradition a category of "dangerous persons." Ans. at 27. To the Government, dangerousness appears to include anything in violation of the law in this "evolved" world: "There are more laws to violate than there were in the Founding Era, more ways to violate them, and more ways to be dangerous with them." *Id*. The Government's position is clear: if a law is broken, that is enough to disarm a non-violent offender of their Constitutional right to bear arms because they are "irresponsible" and "dangerous." Unfortunately for the Government, this is not the law under *Bruen* nor the Court's recent decision in *Rahimi*.

First, the Supreme Court just rejected the Government's contention that an individual may "be disarmed simply because he is not 'responsible.'" *Rahimi,* 2024 U.S. LEXIS 2714, at *29-30.

> "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. *See, e.g.,* [*District of Columbia v. Heller,* 554 U.S. 570,

[28] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022); *see also United States v. Rahimi*, 602 U.S. __, 2024 U.S. LEXIS 2714 (2024) (reaffirming the history and tradition analysis when reviewing Section 922(g)(8)).

> 635 (2008)]; *Bruen*, 597 U.S. at 70. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible."

Id. at 30. Therefore, the Government's initial contention that because TSgt Folts is "irresponsible" he should be barred from ever owning a firearm is unpersuasive.

Turning to "dangerousness," the Government's cursory review of the text, history, and tradition of firearms regulation has two main problems. First, it failed to recognize that a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because the categorization of crimes as felonies has not only increased but it has been implemented in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 Harv. J.L. & Pub. Pol'y 695, 697 (2009). Notably, the "federal 'felon' disability—barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm—is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. As such, simply because TSgt Folts is convicted of a "felony," does not mean a permanent firearm ban as applied to him is constitutional in light of the relative recent history surrounding the felony firearm bar.

The Government's second problem is its assertion that "dangerousness" is enough to permanently bar TSgt Folts from owning a firearm does not take into account the historical record

of violent versus non-violent crimes. Violence, historically, was the test used throughout this country's history *if* a law imposed a ban at all:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

Id. at 698 (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver . . . ." *Id*. at 701 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698.

The Supreme Court illuminated this emphasis on violence further through its historical analysis in *Rahimi* when reviewing Section 922(g)(8). The Court concluded "the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." *Rahimi*, 2024 U.S. LEXIS 2714, at *18. There are several critical points to the Court's conclusion, which are relevant to TSgt Folts' case and historical analysis, even though the Court was discussing a different part of Section 922.

First, Section 922(g)(8) requires a court to find the individual at issue posed a "credible threat" to the physical safety of another, per the statute. *Id*. at *25-26. This finding is loaded with due process, which parallels the historical tradition of surety laws, which "often offered the accused significant procedural protections" and were for "preventing violence before it occurred."

Id. at *23. In such situations, "the magistrate would take evidence, and—if he determined that cause existed for the charge—summon the accused, who could respond to the allegations." *Id*. In *Rahimi*, the Supreme Court did not address any due process claims, but notes the possibility in a footnote. *Id*. at *29 n.2. Nevertheless, the tailored part of Section 922(g)(8) requiring a "credible threat" finding was grounded in a historical analogue of surety laws and was focused on preventing violence after "judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at *23, 26.

Second, Section 922(g)(8) is all about *physical safety* or *violence* towards others, not a general assertion of "dangerousness." Just like with the historical "going armed laws," the prohibition under Section 922(g)(8) is about someone endangering the physical safety of another. *Id*. at *23-25. The Government could prevent individuals from "going armed, with dangerous or unusual weapons, to terrify the good people of the land." *Id*. at *24. Today, it can still disarm those comparable individuals. *Id*. at *25-26.

Third, combing the above two points, history reveals "when an individual poses a *clear* threat of *physical violence* to another, the threatening individual may be disarmed"—temporarily. *Id*. at *26. The Supreme Court highlighted the temporary nature of Section 922(g)(8)'s firearm ban; it is only active while the restraining order, or the finding of a clear threat of physical violence, is active. *Id*.

Section 922(g)(8) overall comports with the Second Amendment, but the analysis conducted by the Court in *Rahimi* suggests, as applied to TSgt Folts, the broad firearm bar in Section 922(g)(1) would not survive such scrutiny. While the Court suggested Section 922(g)(1) would survive a facial challenge,[29] it did make clear there still must be a historical analogue to a

[29] The Supreme Court noted, "[W]e do not suggest that the Second Amendment prohibits the

firearm ban. *Id*. at *26. In other words, Section 922(g)(1), which broadly prohibits possession of guns by an entire category of persons (felons), still requires the Government to demonstrate a ban, especially a *lifetime* ban, as applied, is in line with history and tradition. Here, with TSgt Folts' as-applied challenge, the Government did not and cannot.

TSgt Folts did not commit a historically violent crime. He did not, and is not at risk of, endangering the physical safety of another person. He sent memes to his stepdaughter, unaccompanied by any commentary suggesting a sexual interest in children. There was no aspect or element of physical violence in his conviction whatsoever. As a result of his conviction, he is a felon and a sex offender, but he is not a *violent* offender. This is the necessary distinction that both *Rahimi* and history continue to highlight: American history of firearm restrictions focused on *violent* offenders. *See, e.g., id.* at *26 ("That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon."). The Government cannot avoid the fact TSgt Folts did not touch or physically harm anyone, so instead, it parades recidivism rates around—as though it did that at trial—to prove TSgt Folts is "dangerous." Ans. at 27. To be clear, there is no evidence in the record TSgt Folts is a "serious threat to this Nation" and likely to reoffend. Unlike in *Rahimi*, there is no credible or clear evidence showing TSgt Folts poses a threat to anyone.

This is what is deeply disturbing about the lack of due process in the indiscriminate firearm ban the Government employs: the Government is never held to its burden, and now, on appeal, uses essentially expert testimony to claim TSgt Folts has "a continued sexual interest in minors" and "poses a real threat to our most vulnerable demographic--the children." Ans. at 27. This is

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enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse," like "felons and the mentally ill." *Rahimi*, 2024 U.S. LEXIS 2714, at *26.

beyond the pale, and, in light of *Rahimi*, ungrounded from historical analogues laden with due process. TSgt Folts had—and currently has, in light of this Court's ruling in *Vanzant*[30]—*zero* due process to challenge the Government's ban in the military justice system.[31]

Furthermore, the Government's reliance on sweeping assertions about recidivism continues to reveal the weakness of the Government's case. Just like it had to rely on the acquitted offenses when attempting to show legal and factual sufficiency, *see supra*, the Government has to rely on evidence not in this record or applied to TSgt Folts to show he is "dangerous," when, one, that is not the correct test, and two, the Government could have attempted to show recidivism at trial, but it chose not to. It goes without saying any recidivism evidence would have been rebutted at trial. However, here, even any rebuttal to "generalized" or "common knowledge" of recidivism was not even needed; TSgt Folts received 16 days in jail when he could have received up to 15 years. R. at 2140. Clearly, he is not a "serious threat to this Nation" when he has been walking free amongst the people almost since the day he was convicted. He is not "dangerous," a physical threat to anyone, or violent.

The text, history, and tradition from the founding indicates that 18 U.S.C. § 922(g)(1) as applied to TSgt Folts is unconstitutional. The Government not only failed to meet its burden of proof, but it failed to discuss important history relating to firearms regulations, instead speaking broadly about recidivism rates, which are neither contained in the record nor applicable to TSgt Folts. This Court should not be swayed by the Government's misunderstanding of the law and the

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30 *Vanzant*, 2024 CCA LEXIS 215, at *23-25.

31 *See* Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing*, dated July 21, 2020, Chapter 9 (revealing no "expungement" or "correction" process for erroneous firearm bars); *compare* R.C.M. 1111(c) *with* R.C.M. 1104 (showing no contemplation for correction of the EOJ with a post-trial motion).

record. This Court should find the Government's firearm prohibition unconstitutional and order correction of the Entry of Judgment.

Conclusion

This Court should find that the Government failed to prove each element of the offense of conviction beyond a reasonable doubt; specifically, that the memes at issue were indecent and sent with an intent to gratify TSgt Folts' sexual desire. The section of Article 120b(c), UCMJ, about "indecent language" is unconstitutional on its face and as applied to TSgt Folts. He was not on notice his conduct was unlawful, and he had a First Amendment right to send the memes at issue. Finally, this Court should order correction of case documents indicating he is banned from possessing a firearm for life. TSgt Folts asks the Court to set aside the findings and the sentence, and dismiss the charge and specification with prejudice.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing document was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 28 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Technical Sergeant (E-6) **DOUGLAS M. FOLTS**, United States Air Force, *Appellant.*	**APPELLANT'S MOTION FOR ORAL ARGUMENT OUT OF TIME** Before Special Panel No. ACM 40322 Filed on: 28 June 2024

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

Pursuant to Rule 25 of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Douglas M. Folts, the Appellant, and his counsel respectfully seek oral argument in this case. The Assignments of Error are:

I.
THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THE LANGUAGE COMMUNICATED (THE MEMES) WAS INDECENT – SYNONYMOUS WITH OBSCENE – OR COMMUNICATED WITH CRIMINAL INTENT.

II.
TSGT FOLTS DID NOT HAVE FAIR NOTICE THAT SENDING THE THREE MEMES CONSTITUTED SEXUAL ABUSE OF A CHILD.

III.
AS APPLIED TO TSGT FOLTS, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022).

Counsel seek oral argument on Issues I and II and will be prepared to argue Issue III if the Court so orders.

There is good cause for filing this motion out of time. On 21 June 2024, undersigned counsel filed a Consent Motion for An Enlargement Of Time To File the Reply Brief due to civilian appellate defense counsel's hospitalization. This Court granted the enlargement request on the same day. Truthfully, the Motion for Oral Argument was not at the forefront of counsel's mind and it was an oversight that the Consent Motion did not include the Motion for Oral Argument in addition to the Reply Brief. Usually, the Reply Brief and Motion for Oral Argument are filed simultaneously, seven days after the Government files its Answer. The Government's Answer and TSgt Folts' Reply Brief deal heavily with constitutional law issues upon which the parties disagree. We respectfully submit oral argument will be helpful to the Court on the two intertwined issues listed above.

TSgt Folts respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing document was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 28 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **DOUGLAS M. FOLTS** United States Air Force *Appellant.*	))))))))))	UNITED STATES' OPPOSITION TO MOTION FOR ORAL ARGUMENT Before Special Panel No. ACM 40322 8 July 2024

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

Pursuant to Rule 25 of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument out of time, filed 28 June 2024.

This Court should deny the motion because Appellant has not satisfactorily established why oral argument is necessary in this case. Appellant asserts that oral argument "will be helpful to the Court" on the two assignments of error that deal with "constitutional law issues upon which the parties disagree." (App. Mot. at 2.) But Appellant has had sufficient opportunity to assert his position through his written filings and has not articulated what oral argument could provide that his filings do not. Holding an oral argument could further delay post-trial processing in a case that has been on this Court's docket for 14 months at the time Appellant filed his original assignments of error, and 16 months as of the date of this filing.

WHEREFORE, the United States respectfully requests that this Court deny Petitioner's motion for oral argument.

pt, USAF
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Appellant's civilian appellate defense counsel, and the Air Force Appellate Defense Division on 8 July 2024.

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