IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A)**
v.	)	
	)	
Major (O-4)	)	No. ACM XXXXX
JORGE A. ARIZPE	)	
United States Air Force	)	14 July 2023
Appellant	)	

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

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Major (Maj) Jorge A. Arizpe, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Maj Arizpe was found not guilty of one specification of disobeying a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Maj Arizpe to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.* On 10 May 2023, the Government sent Maj Arizpe the required notice by mail of his right to appeal within 90 days. Maj Arizpe has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. Pursuant to the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, Maj Arizpe files his notice of direct appeal with this Court.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 July 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40507**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jorge A. ARIZPE	)	**DOCKETING**
Major (O-4)	)	
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 submitted by Appellant and received by this court in the above-styled case on 14 July 2023. On 14 August 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

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

ORDERED:

The case in the above-styled matter is referred to Panel 1. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40507**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jorge A. ARIZPE	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 13 January 2023, Appellant was convicted at a general court-martial of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933.[1] The military judge sentenced Appellant to 35 days confinement, forfeiture of $1,200.00 pay per month for two months, and a reprimand. On 14 July 2023, the Appellant filed a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A),[2] which was docketed with this court on 14 August 2023.

On 17 August 2023, Appellant moved to attach an email to present to this court that the Government requested the Air Force Trial Judiciary produce a verbatim transcript in his case. Appellant further requested that this court suspend Rule 18 until such time a verbatim transcript has been produced by the Government. *See* JT. CT. CRIM. APP. R. 18.

On 17 August 2023, the Government responded, requesting the court grant Appellant's motion.

In consideration of the foregoing, and the Government's position, the court grants the Appellant's Motion to Attach, suspends Rule 18, and will establish a timeline for the completion of this transcript.

Accordingly, it is by the court on this 23d day of August, 2023,

---

[1] References to the punitive articles of the UCMJ in this order are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

ORDERED:

Appellant's Motion to Attach and Suspend Rule 18 is **GRANTED.**

It is further ordered:

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **20 October 2023**. If the transcript cannot be provided to the court and the parties by that date, the Government will inform the court in writing not later than **12 October 2023** of the status of the Government's compliance with this order.

Appellant's brief will be submitted in accordance with the timelines established under Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals with one exception: Appellant's brief shall be filed within 60 days after appellate defense counsel has received a printed or digital copy of the certified verbatim transcript.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	))))))))))	**MOTION TO ATTACH AND SUSPEND RULE 18** Before Panel 1 No. ACM 40507 17 August 2023

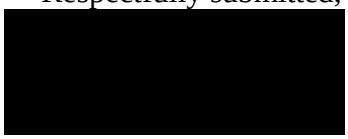
TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(b) and 23.3(r) of this Honorable Court's Rules of Practice and Procedure, Major (Maj) Jorge A. Arizpe moves (1) to attach the document contained in the Appendix to the Record of Trial, and (2) for this Honorable Court to suspend its rules regarding the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until the verbatim transcript is produced.

The e-mail included in the Appendix is relevant to the Appellant's request that this Honorable Court suspend its rules regarding the time for filing a Brief on Behalf of Appellant. The authenticity of the email is apparent. Appellant does not have a verbatim transcript of his trial. The email contains a request from the Government to the Trial Judiciary (JAT) to produce a verbatim transcript in the case. Since the Government has already requested JAT prepare a verbatim transcript, it is unnecessary for Appellant to move this court to order its production. However, Appellant respectfully requests this Honorable Court suspend Rule 18 until such a time as a verbatim transcript has been produced by the Government.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach and to Suspend Rule 18.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770
Office: (240) 612-4772

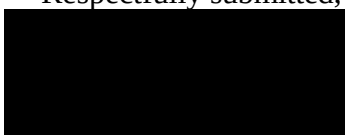
Appendix

1. Government's Email to JAT Central Docketing Workflow, dated 8 August 2023.

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 17 August 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

17 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM 40507 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 Attach and Suspend Rule 18.

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

[redacted]
PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION**
Appellee	)	**TO ATTACH DOCUMENTS**
	)	
v.	)	Before Panel No. 2
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE,	)	
United States Air Force	)	17 October 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 – General Court Martial Verbatim Transcript without sealed material – United States v. Major Jorge A. Arizpe, dated, 24 May 2022 (1040 pages)

B. Appendix B – General Court-Martial Verbatim Transcript with Sealed Portions – United States v. Major Jorge A. Arizpe, dated, 24 March 2023 (1061 pages)

On 23 August 2023, this Court ordered the Government to prepare a verbatim transcript in this case. (*Order*, dated 23 August 2023). These appendices are responsive to the Court's order. The attached files contain (A) an electronic version of the unsealed portions of the transcript; and (B) a hard copy of the transcript with all sealed portions of the transcript included delivered to Joint Base Andrews via USPS on 17 October 2023. Since the attachment contains sealed materials, it was delivered only to the Court via JAJM.

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

[redacted]
JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court on 18 October 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
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40507**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Jorge A. ARIZPE	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 27th day of October, 2023,

ORDERED:

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

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	7 December 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **14 February 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 115 days have elapsed. On the date requested, 184 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. As such, the brief is currently due 17 December 2023.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 21 cases, with nine initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Undersigned counsel's current priority is submitting the Petition and Supplement for Grant of Review in *United States v. Dugan* (ACM 40320) to the Court of Appeals for the Armed Forces (CAAF).

This case is currently undersigned counsel's seventh priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Undersigned counsel has an appointment with this Court to review sealed material in this case on Tuesday, 12 December 2023. Undersigned counsel will continue review of the record of trial after completing the current priority listed above.

2. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
3. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
4. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
5. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.
6. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

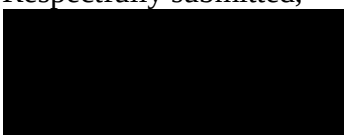
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel

Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.caine.1@us.af.mil

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 December 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.caine.1@us.af.mil

11 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 11 December 2023.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507 5 February 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 March 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 175 days have elapsed. On the date requested, 214 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 21 cases, with 13 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 1 in this case, undersigned counsel filed the Petition for Writ of Certiorari in *United States v. Smith* (ACM 36785) with the Supreme Court of the United States (SCOTUS); the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) with the Court of Appeals for the Armed Forces (CAAF); and the Brief on Behalf of Appellant in *United States v. Hennessy* (ACM 40439) with this Court.

Undersigned counsel's current priority is finishing the Supplement to the Petition for Grant of Review in *United States v. Edwards* (ACM 40349) and potentially up to three other Petitions and Supplements to the Petitions for Grant of Review due to the CAAF. Undersigned counsel assisted in the preparation for and will be sitting second chair in the oral argument scheduled at the CAAF on 7 February 2024 in *United States v. Guihama* (ACM 40039).

This case is currently undersigned counsel's seventh priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
2. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
3. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
4. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.
5. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.
6. *United States v. Clark* (ACM 40540): The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.caine.1@us.af.mil

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 5 February 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.caine.1@us.af.mil

6 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 6 February 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507 5 March 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 April 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 204 days have elapsed. On the date requested, 244 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 13 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 2 in this case, undersigned counsel has filed the Supplement to the Petition for Grant of Review in *United States v. Edwards* (ACM 40349) with the Court of Appeals for the Armed Forces (CAAF); the Petition for Grant of Review and Supplement to the Petition for Grant of Review in *United States v. Greene-Watson* (ACM 40293) with the CAAF; and the Petition for Grant of Review and Supplement to the Petition for Grant of Review in *United States v. Emerson* (ACM 40297) with the CAAF. Undersigned counsel also spent around 13 hours preparing for moots, assisting in moots, and attending oral arguments. Undersigned counsel was second chair at the oral argument before the CAAF on 7 February 2024 in *United States v. Guihama* (ACM 40039).

This case is currently undersigned counsel's ninth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arroyo* (ACM 40321 (f rev)): On 9 February 2024, undersigned counsel submitted a post-remand Motion for Enlargement of Time (First) for the

amount of 60 days to end on 19 April 2024. On 15 February 2024, this Court granted the motion in part requiring undersigned counsel to file any additional AOEs no later than 20 March 2024. As such, this case has now been re-prioritized by this Court. Undersigned counsel has reviewed the additional documents now in the record after remand and working on any additional AOE(s). Also on 15 February 2024, this Court ordered an outreach oral argument for one issue in this case scheduled for 10 April 2024.

2. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes.
3. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
4. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
5. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
6. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

7. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.
8. *United States v. Clark* (ACM 40540): The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

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 5 March 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

6 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 6 March 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507 4 April 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 May 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 234 days have elapsed. On the date requested, 274 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 16 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 3 in this case, undersigned counsel has filed the Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court; the Appellee's Answer in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with this Court; and the Reply Brief in *United States v. Hennessy* (ACM 40439) with this Court. Undersigned counsel planned and orchestrated the all-day Human Trafficking Training Event held at the Smart Center on Monday, 25 March 2024. Undersigned counsel also spent around 14 hours preparing for moots, assisting in moots, and attending oral arguments.

This case is currently undersigned counsel's ninth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arroyo* (ACM 40321 (f rev)): On 15 February 2024, this Court ordered an outreach oral argument for one issue in this case scheduled for 10 April 2024.

2. *United States v. Douglas* (ACM 40324 (f rev)): On 22 March 2024, this Court granted in part the appellant's motion for an enlargement of time. As such, any additional AOE must be filed by 2 May 2024.
3. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
4. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
5. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes. On 3 April 2024, this Court granted the Government's motion for oral argument in this case. Depending on this Court's scheduling of the oral argument, this case would potentially need to be prioritized ahead of *Martell*.
6. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.
7. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.
8. *United States v. Clark* (ACM 40540): The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

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 4 April 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

5 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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.

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 5 April 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507 3 May 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 June 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 304 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 4 in this case, undersigned counsel has filed the Reply Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court; an Opposition to the Government's Motion to Cite Supplemental Authorities in *Arroyo* with this Court; the Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324 (f rev)) with this Court; an Opposition to the Government's Motion for Reconsideration: Citation of Supplemental Authorities in *Arroyo* with this Court; and Motions to Withdraw from Appellate Review and Motions to Attach in *United States v. Johnson* (ACM S32774) and *United States v. Willems* (ACM 40562) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed. Undersigned counsel also represented SrA Arroyo at the outreach oral argument held on 10 April 2024 and spent around 5 hours preparing for a colleague's moots, assisting in moots, and attending oral argument. Of note, the FOA Sports Day is scheduled for Friday, 10 May; the

Court of Appeals for the Armed Forces (CAAF) Continuing Legal Education (CLE) training is scheduled for 15-16 May; and Memorial Day weekend—including a Family Day—is 24-27 May.

This case is currently undersigned counsel's seventh priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Undersigned counsel will complete review of the record of trial today and will continue drafting the AOEs next week.
2. *United States v. Holmes* (Misc. Dkt. No. 2024-1): On 5 April 2024, this Court ordered oral argument scheduled for 31 May 2024. After sending the draft AOEs for *Sherman* to the civilian appellate defense counsel, undersigned counsel will turn to preparation for oral argument in *Holmes*.
3. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
4. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.
5. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.

6. *United States v. Clark* (ACM 40540): The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 May 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

7 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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.

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 7 May 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507
	)	3 June 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 July 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 294 days have elapsed. On the date requested, 334 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 229 days have elapsed. On the date requested, 269 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. §

933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 16 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 5 in this case, undersigned counsel has sent the Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) to civilian appellate defense counsel for review; filed the Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Brockington* (ACM S32768) with this Court; and conducted oral argument in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed.

Of note, the FOA Sports Day was Friday, 10 May; the Court of Appeals for the Armed Forces (CAAF) Continuing Legal Education (CLE) training was held 15-16 May; Memorial Day weekend—including a Family Day—was 24-27 May; and Juneteenth is 19 June 2024 with a

Family Day scheduled for 20 June 2024. Undersigned counsel also has scheduled leave 13-16 June and 26 June – 1 July.

Undersigned counsel's next priorities are a potential Reply Brief in *United States v. Douglas* (ACM 40324 (f rev)), currently due to this Court on 10 June 2024, and the Joint Appendix and Grant Brief in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293), which are currently due to the CAAF on 26 June 2024.

This case is currently undersigned counsel's fifth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit. Of note, this case moved up in priority for undersigned counsel to attempt to get review done prior to going on leave at the end of June. Given the Grant Brief and Joint Appendix in *Greene-Watson* will be due to the CAAF before the end of June and takes priority, it is highly unlikely undersigned counsel would be able to finish review of *Martell*'s record prior to taking leave as it is substantially longer than *Duthu*.
2. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.

3. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.
4. *United States v. Clark* (ACM 40540): The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 June 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

5 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 5 June 2024.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (SEVENTH)**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	3 July 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 August 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 324 days have elapsed. On the date requested, 364 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 259 days have elapsed. On the date requested, 299 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. §

933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification of disobeying a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 21 cases, with 14 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 6 in this case, undersigned counsel has filed the Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Tafolla* (ACM 40572) and *United States v. Duthu* (ACM 40512) with this Court; the Reply Brief on Behalf Appellant in *United States v. Douglas* (ACM 40324) with this Court; the Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) with this Court; and the Grant Brief and Joint Appendix in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293) with the Court of Appeals for the Armed Forces (CAAF). Motions to Withdraw from Appellate Review and Motions to Attach require review of the records to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed.

Of note, Juneteenth was 19 June 2024 with a Family Day scheduled for 20 June 2024 and the 4th of July holiday and Family Day are 4-5 July 2024. Undersigned counsel also had scheduled leave 13-16 June and 26 June – 1 July and upcoming scheduled leave 8-10 July.

This case is currently undersigned counsel's fourth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Of note, this case moved up in priority for undersigned counsel to complete review prior to going on leave at the end of June. Given the Grant Brief and Joint Appendix in *Greene-Watson* was due to the CAAF before the end of June and took priority, it was highly unlikely undersigned counsel would be able to finish review of *Martell*'s record prior to taking leave as it is substantially longer than *Clark*. Undersigned counsel has completed review of the record and is editing the draft Brief on Behalf of Appellant, which is currently due 8 July 2024.
2. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
3. *United States v. Clark* (ACM 40540): The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 July 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

8 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 364 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not begun 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.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 8 July 2024.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (EIGHTH)**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	2 August 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 September 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 354 days have elapsed. On the date requested, 394 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 289 days have elapsed. On the date requested, 329 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant

was found not guilty of one specification of disobeying a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 8 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 7 in this case, undersigned counsel has filed the Brief on Behalf of Appellant in *United States v. Clark* (ACM 23017) with this Court; and civilian appellate defense counsel filed the Brief on Behalf of Appellant in *United States v. Martell* (ACM 40501) with this Court.

Of note, the 4th of July holiday and Family Day were 4-5 July 2024. Undersigned counsel also had scheduled leave 26 June – 1 July and 8-10 July. Additionally, the JAJA Newcomers Training is scheduled for 13-14 August 2021. Undersigned counsel is working on the Reply Brief in *Greene-Watson* currently due to the CAAF on 5 August 2024. Undersigned counsel will then be working on the Petition and Supplement to the Petition in *United States v. Arroyo* (ACM 40321 (f rev)) currently due to the CAAF on 17 August 2024. Further, a potential Reply Brief in *United States v. Clark* (ACM 23017) is tentatively due to this Court on 14 August 2024.

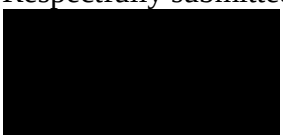
This case is currently undersigned counsel's first priority before this Court. Undersigned counsel has not started review of the record of trial in this case. Of note, this case has moved up

in priority given civilian appellate defense counsel's availability to work on *United States v. Clark* (ACM 40540).

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

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

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

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 2 August 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

5 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 329 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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
(240) 612-4800

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 5 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507
	)	29 August 2024

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 October 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 424 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 316 days have elapsed. On the date requested, 359 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant

was found not guilty of one specification of disobeying a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 21 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 8 in this case, undersigned counsel has filed the Reply Brief in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293) and the Petition in *United States v. Arroyo* (ACM 40321 (f rev)) with the Court of Appeals for the Armed Forces (CAAF).

Of note, the JAJA Newcomers Training was held 13-14 August 2024, and the Joint Appellate Advocacy Training (JAAT) is scheduled for 25-26 September 2024. Undersigned counsel will file the Supplement to the Petition in *Arroyo* in the near future (now due 3 September 2024). Undersigned counsel is currently working on the Petition and Supplement to the Petition in *United States v. Van Velson* (ACM 40401), which is due to the CAAF on 10 September 2024. Additionally, the Petition in *United States v. Holmes* (Misc. Dkt. No. 2024-1) is due to the CAAF on 10 September as well. Undersigned counsel will turn to the Supplement to the Petition in *Holmes* after filing the Supplements to the Petitions in both *Arroyo* and *Van Velson*. A potential Reply Brief is due to this Court in *United States v. Martell* (ACM 40501) on 4 September 2024,

which civilian appellate defense counsel is currently working. Undersigned counsel will then be turning to oral argument preparations in *Greene-Watson*, which is currently scheduled as an outreach oral argument with the CAAF on 10 October 2024. Finally, a potential Reply Brief will also be due to this Court in *United States v. Sherman* (ACM 40486) at some point in September 2024.

This case is currently undersigned counsel's first priority before this Court. Undersigned counsel has not started review of the record of trial in this case. Of note, this case has moved up in priority given civilian appellate defense counsel's availability to work on *United States v. Clark* (ACM 40540) and the higher EOT number in this case.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 August 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

4 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 359 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 4 September 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40507**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jorge A. ARIZPE	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 1 October 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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 3d day of October, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **10 November 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time will likely necessitate a status conference.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (TENTH)**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	1 October 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 November 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 414 days have elapsed. On the date requested, 454 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 349 days have elapsed. On the date requested, 389 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 18 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 9 in this case, undersigned counsel has filed the Supplement to the Petition for Grant of Review in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the Court of Appeals for the Armed Forces (CAAF); the Petitions and Supplements to the Petitions for Grant of Review in *United States v. Van Velson* (ACM 40401, USCA Dkt. No. 24-0225/AF) and *United States v. Holmes* (Misc. Dkt. No. 2024-1, USCA Dkt. No. 24-0224/AF) with the CAAF; a Motion for Reconsideration in *United States v. Hennessy* (ACM 40439) with this Court; the Reply Brief in *United States v. Sherman* (ACM 40486) with this Court; and civilian appellate defense counsel filed the Reply Brief in *United States v. Martell* (ACM 40501) with this Court.

Of note, the family day/Labor Day holiday weekend was 30 August-2 September; and the family day/Indigenous Peoples' Day is 11-14 October. Military appellate defense counsel was also on unexpected family leave 24-27 September 2024. Undersigned counsel is currently preparing for oral argument in *United States v. Greene-Watson* (ACM 40293, USCA Dkt. No.

24-0096/AF), which is currently scheduled as an outreach oral argument with the CAAF on 10 October 2024.

This case is currently undersigned counsel's first priority before this Court. Undersigned counsel has not started review of the record of trial in this case but intends to once *Greene-Watson*'s oral argument is done. Of note, this case has moved up in priority given civilian appellate defense counsel's availability to work on *United States v. Clark* (ACM 40540) and the higher EOT number in this case.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

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 1 October 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

2 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 454 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 2 October 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (ELEVENTH)**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	1 November 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 December 2024**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 445 days have elapsed. On the date requested, 484 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 380 days have elapsed. On the date requested, 419 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification in violation of Article 92,

UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 16 cases, with 8 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 10 in this case, undersigned counsel has filed a Reply Brief in *United States v. Holmes* (Misc. Dkt. No. 2024-1, USCA Dkt. No. 24-0224/AF) with the Court of Appeals for the Armed Forces (CAAF) and prepared for and argued on behalf of the appellant in *United States v. Greene-Watson* (ACM 40293, USCA Dkt. No. 24-0096/AF) at the outreach oral argument with the CAAF on 10 October 2024.

Undersigned counsel's intent was to begin review of this case after finishing the outreach oral argument in *Greene-Watson* and following the family day/Indigenous Peoples' Day weekend (11-14 October 2024). However, on 7 October 2024, the CAAF granted review of one issue in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the Grant Brief and Joint Appendix now currently due 12 November 2024. Additionally, while undersigned counsel was out on emergency medical leave last week, the CAAF granted review on two issues in *United States v. Navarro Aguirre* (ACM 40352, USCA Dkt. No. 24-0146/AF) with the Grant Brief and Joint Appendix then also due 12 November 2024. However, given the congestion of

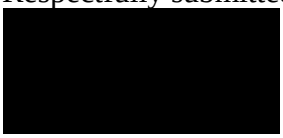
undersigned counsel's docket and that undersigned counsel did not represent the appellant in *Navarro Aguirre* at the lower court, the case was moved to alternative appellate defense counsel.

This case is currently undersigned counsel's first priority before this Court. Undersigned counsel has minimally begun review of the record of trial in this case but intends to turn back to it once the Grant Brief and Joint Appendix in *Arroyo* are filed with the CAAF.

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

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

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

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 1 November 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

4 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 419 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 4 November 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40507**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jorge A. ARIZPE	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 20 November 2024, Appellant's counsel submitted a Consent Motion to Examine Sealed Material, requesting both parties be allowed to examine Appellate Exhibits IV, V, VI, XIX, transcript pages 44-64 and the audio of the closed Mil. R. Evid. 514 motion session. These exhibits were presented or reviewed by the parties at trial.

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." R.C.M. 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of these sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 22d day of November, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits IV, V, VI, XIX, transcript pages 44-64 and the audio of the closed Mil. R. Evid. 514 motion session**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

SEAN J. SULLIVAN, Maj, USAF
Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIAL**
v.	)	
	)	Before Special Panel
Major (O-4)	)	
JORGE A. ARIZPE	)	No. ACM 40507
United States Air Force	)	
Appellant	)	20 November 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties to examine the following sealed material:

- Appellate Exhibit IV – Defense Motion to Compel Pursuant to Mil. R. Evid. 514 (victim advocate/victim privilege)
- Appellate Exhibit V – Government Response to Defense Motion to Compel Pursuant to Mil. R. Evid. 514
- Appellate Exhibit VI – VC Response to Defense Motion to Compel Pursuant to Mil. R. Evid. 514
- Appellate Exhibit XIX – Ruling – Defense Motion to Compel Pursuant to Mil. R. Evid. 514
- Transcript pages 44-64 – closed hearing on the Mil. R. Evid. 514 motion
- Audio of the closed session on the Mil. R. Evid. 514 motion

All parties at trial reviewed the above listed exhibits and attended the closed session. At this time, Appellant is not requesting to view Appellate Exhibit XXIV, which was only viewed in camera by the military judge and not released to the parties. R. at 214. Therefore, R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities applies. Accordingly, undersigned counsel asserts that review of the referenced sealed material above is necessary to conduct a

complete review of the record of trial and to be able to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial[1] is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, 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, UCMJ, 10 U.S.C. § 866, appellate defense 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 referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill their duties of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by Appellant.

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

Respectfully submitted,

---

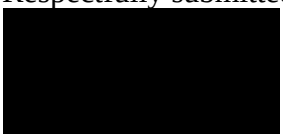
[1] Undersigned counsel is not currently requesting to view Appellate Exhibit XXIV, as stated above, and will instead file a second motion demonstrating good cause, pursuant to R.C.M. 1113(b)(3(B)(ii), should it become necessary. Until such a time, confirming there is a sealed folder identified as Appellate Exhibit XXIV is sufficient.

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4772
Email: heather.bruha@us.af.mil

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 20 November 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4772
Email: heather.bruha@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (TWELFTH)**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	25 November 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 January 2025**.[1] The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 470 days have elapsed. On the date requested, 515 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 405 days have elapsed. On the date requested, 450 days will have elapsed from the date undersigned counsel received the certified verbatim transcript.

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification in violation of Article 120, Uniform Code of

[1] Undersigned counsel will make all efforts to file prior to this deadline, but the requested amount of time allows for all necessary internal reviews as well as other briefs due during this time.

Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 16 cases, with 7 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 11 in this case, undersigned counsel has filed a Motion for an Extension of Time to file the Petition for Certiorari in *United States v. Guihama* (ACM 40039) with the Supreme Court of the United States (SCOTUS); the Joint Appendix (JA)[2] and Grant Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the CAAF; and a Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Harmon* (ACM S32785) with this Court. Motions to withdraw from appellate review require appellant counsel to conduct a review of the record and advise the appellant. Undersigned counsel also spent approximately 4 hours reviewing the opinion in *United*

[2] Undersigned counsel asked Government appellate counsel to assist in pulling the portions of the JA it requested for compiling, but Government appellate counsel refused stating the rules make clear the appellant alone is responsible for the JA including the parts (and redactions) the appellee requests. As such, while titled "Joint," the appellant was solely responsible for the JA.

States v. Martell (ACM 40501) and applicable case law, consulting with civilian appellate defense counsel, and advising the appellant in *Martell* on a potential motion for reconsideration with this Court or petition for grant of review with the CAAF.

Of note, the Veterans Day holiday and family day were 8-11 November 2024. Undersigned counsel was also occupied from noon until the end of the duty day on 13 November 2024 with a medical appointment for her son.[3] And as a single parent, undersigned counsel had to telework with her five-year-old for two days during this timeframe since there was no school and no aftercare available. Since filing EOT 8 in this case, undersigned counsel prepared for and participated as a moot judge in one moot argument and additional mentoring (equaling 4+ hours), completed four peer reviews, and completed approximately 7 hours of virtual training/certifications.

Undersigned counsel's intent was to begin review of this case after finishing the outreach oral argument in *Greene-Watson* and following the family day/Indigenous Peoples' Day weekend (11-14 October 2024). However, on 7 October 2024, the CAAF granted review of one issue in *Arroyo* with the Grant Brief and JA due 12 November 2024. Undersigned counsel's intent was then to return to review of this case after filing the Grant Brief and JA in *Arroyo*, which she did. However, Panel 2 deny stamped undersigned counsel's EOT 10 in the *Clark* (ACM 40540) case so undersigned counsel was forced to reprioritize.

This case is now undersigned counsel's second priority before this Court. Undersigned counsel has reviewed approximately two of the four volumes and about 50 pages of the 1,040-page transcript in this case.

[3] Military appellate defense counsel elects to not provide further details given all filings are made public. However, further details may be shared in a status conference should this Court be inclined to deny this EOT request.

1. *United States v. Clark* (ACM 40540): The trial transcript is 1,579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits. On 30 April 2024, this Court granted in part appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Undersigned counsel transmitted the sealed material to civilian counsel pursuant to this Court's original order. However, since reviewing the record, undersigned counsel identified two additional exhibits which were sealed and filed a consent motion to view and transmit on 19 November 2024. This Court granted that motion, so undersigned counsel has since transmitted those two sealed exhibits to civilian counsel. Undersigned counsel has finished review of 9 of the 13 volumes of the record (the remaining volumes contain the transcript). Undersigned counsel is finishing review (90% done) of the 1,579-page transcript and started drafting one AOE. Undersigned counsel received the draft AOEs from civilian appellate defense counsel today and has begun editing as well. Additionally, undersigned counsel has a client call scheduled tomorrow morning prior to flying out for leave to discuss the issues and any other potential issues the client wishes to raise via *Grostefon*.

    a. Of note, reviewing a record this large this fast (10 calendar days) is not normal. After Panel 2 reprioritized undersigned counsel's docket by deny stamping EOT 10 in *Clark* a day before the AOE was due, undersigned counsel had to stop review of *Arizpe* to review *Clark* at an advanced timeline. Undersigned counsel filed a motion for reconsideration of the deny stamped motion, but Panel 2 did not rule on it until 19 November 2024.

During the intervening time, undersigned counsel urgently reviewed the record over the weekend. Of note, undersigned counsel already works nights, weekends, during leave, during TDYs, over the holidays, and while sick. However, this intense review of *Clark* was on a different level. One that cannot be expected of the *Arizpe* record as undersigned counsel does not have civilian counsel on the case and is responsible for the initial draft as well as getting the draft through various office reviews prior to filing. This also does not account for the time necessary to conduct necessary research and to consult the client.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he relayed that given the reprioritization of Panel 2 on undersigned counsel's docket, he felt he must consent to the necessary enlargement of time in order to allow adequate representation of counsel.

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 November 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

27 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 November 2024.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507
	)	31 December 2024

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 5-days, which will end on **14 January 2025**. The record of trial was docketed with this Court on 14 August 2023. From the date of docketing to the present date, 505 days have elapsed. On the date requested, 519 days will have elapsed. On 23 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 18 October 2023. From the date of receiving the certified verbatim transcript to the present date, 440 days have elapsed. On the date requested, 454 days will have elapsed from the date undersigned counsel received the certified verbatim transcript. The 5-day extension would allow undersigned counsel the necessary time to finish the brief and route it through the necessary internal review channels. **Undersigned counsel asks for a status conference should this court consider denying this EOT.**

On 13 January 2023, a panel of officer members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification in violation of Article 120, Uniform Code of

Military Justice (UCMJ), 10 U.S.C. § 920 (2019); and one specification in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2019). (Statement of Trial Results, 13 January 2023.) Consistent with his pleas, Appellant was found not guilty of one specification in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). *Id.* The military judge sentenced Appellant to 35 days' confinement, forfeiture of $1,200 pay per month for two months, and a reprimand. *Id.*

The verbatim transcript is 1040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Appellant is not currently confined.

Undersigned counsel is currently assigned 14 cases, with 6 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow the internal reviewing of Appellant's potential errors and final consultation with the client. Since filing EOT 12 in this case, undersigned counsel has filed a Brief on Behalf of Appellant in *United States v. Clark* (ACM 40540) with this Court; a Petition for Grant of Review and Motion for an Extension of Time to File the Supplement Separately in *United States v. Martell* (ACM 40501) with the Court of Appeals for the Armed Forces (CAAF), submitted the Petition for Writ of Certiorari in *United States v. Guihama* (ACM 40039, USCA Dkt. No. 23-0085/AF) to the printer on 16 December 2024 which is due to the Supreme Court of the United States (SCOTUS) on 11 January 2025; and filed the Reply Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the CAAF. Undersigned counsel is also working an Answer to a motion to reconsider in *United States v. Hennessy* (ACM 40439) which will be filed this week.

Of note, the Court and undersigned counsel's office were closed 24-26 December 2024 due to the President's Executive Order, a federal holiday, and a family day; closed 1-2 January 2025 due to a federal holiday and family day; closed 9 January 2025 due to the President's Executive Order; and undersigned counsel has preapproved leave 13 January 2025. Since filing EOT 12 in this case, undersigned counsel prepared for and participated as a moot judge in two moot arguments and attended one oral argument at the CAAF (equaling approximately 9 hours) and completed eight peer reviews. The Supplement to the Petition for Grant of Review in *Martell* is also currently due to the CAAF on 6 January 2025. Undersigned counsel has also been working on the planning and preparations for a *DuBay*[1] hearing ordered in *United States v. Sherman,* (ACM 40486) by this Court, which is currently scheduled for the week of 27 January 2025. Therefore, not considering the holidays, weekends, and a day on leave, undersigned counsel is only really asking for a one day extension.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consents to the necessary enlargement of time in order to allow adequate representation of counsel.

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

[1] *United States v. DuBay,* 37 C.M.R. 411 (C.M.A. 1967).

Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

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 31 December 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

3 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) JORGE A. ARIZPE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40507 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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 454 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed three-fourths 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.

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

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 3 January 2025.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	))	**MOTION TO ATTACH DOCUMENTS**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	))))	No. ACM 40507 14 January 2025

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Major (Maj) Arizpe, hereby moves to attach the following documents to the Record of Trial:

1. Colonel DD Board of Inquiry (BOI) Testimony Transcript, 26 pages (Appendix B)
2. Declaration of Area Defense Counsel (ADC), 1 page (Appendix C)
3. Record of Board Proceedings Page 1, 1 page (Appendix D)
4. Maj Arizpe's Retirement Application, 8 pages (Appendix E)
5. Maj Arizpe's DD 214, 2 pages (Appendix F)

All five attachments are in support of Maj Arizpe's argument relating to Assignment of Error IV. Specifically, the five attachments are relevant to this Court's consideration of Assignment of Error IV because they provide additional support for Maj Arizpe's assertion that there was Unlawful Command Influence (UCI) in his case.

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. The UCI issue is potentially reasonably raised by materials in Maj Arizpe's record, but not fully resolvable from the materials in the record.

WHEREFORE, Maj Arizpe respectfully requests this motion be granted.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 14 January 2025.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	OPPOSITION TO MOTION TO ATTACH
v.	)	Before Special Panel
Major (O-4) **Jorge A. Arizpe** United States Air Force *Appellant.*	)	No. ACM 40507 21 January 2025

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

Pursuant to Rules 23(c) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Attach, dated 14 January 2025.

Opposition to Motion to Attach

On 14 January 2025, Appellant filed the instant Motion to Attach requesting that this Court attach the below five (5) documents to the Record of Trial (ROT):

1. Colonel DD Board of Inquiry (BOI) Testimony Transcript
2. Declaration of Area Defense Counsel (ADC)
3. Record of Board Proceedings Page 1
4. Appellant's Retirement Application; and
5. Appellant's DD 214

(App. Mot. at 1.) The United States opposes Appellant's motion because it fails under the precedent set by United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

This Court is reviewing this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ).[1] When reviewing whether findings of guilt are correct in law and fact in

[1] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are those found in the Manual for Courts-Martial,

accordance with Article 66(c)[2], a "CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present "regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

The Court may consider extra-record documents where: (1) such documents are "necessary for resolving issues raised by materials in the record"; and (2) the issues are not "fully resolvable by those materials" already in the record. Id. at 444-45. The default is a rule of exclusion "because the text of Article 66(c), UCMJ, does not permit the [courts of criminal appeals] to consider matters that are outside the entire record." Id. at 445. This rule of exclusion reflects the notion that, for military justice proceedings to be "truly judicial in nature," appellate courts cannot consider information when it "formed no part of the record." *See* United States v. Fagnan, 30 C.M.R. 192, 195 (U.S.C.M.A. 1961).

Here, Appellant moves to attach documents he argues are related to a claim, raised for the first time on appeal, of Unlawful Command Influence (UCI). (App. Mot. at 1.) Appellant avers these documents, most[3] of which were created and processed well after the convening authority acted and the trial judge signed the Entry of Judgment, meet the standard from Jessie because the "UCI issue is *potentially* reasonably raised by materials in [Appellant's] record, but not fully

---

United States (2019 ed.) [2019 MCM].

[2] References to Article 66(c), UCMJ, are to the version of the statue in effect before implementation of the Military Justice Act of 2016, as incorporated into the 2019 Manual for Courts-Martial, United States. The substantive language of the previous Article 66(c) was preserved by Congress in the 2016 revision and moved to subsection (d)(1). *See* Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019 MCM).

[3] The only proffered document created prior to Appellant's court-martial was his application for retirement which was submitted on 29 November 2023. (App. Mot, Appendix E.)

resolvable from the materials in the record, which Appellant raises as his fourth assignment of error in accordance with United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992). (App. Mot. at 1.) (emphasis added.) Beyond this above claim, Appellant does not offer any analysis to explain how the materials in the record raise the issue of alleged UCI. Apart from Appellant's Retirement Application, none of the proffered documents even existed at the time of the court-martial and could not be discussed or referenced during the court-martial to create a link between the record and the proffered documents. It is particularly difficult to discern how Appellant's retirement package and his DD Form 214, which characterized Appellant's service as "Under Honorable Conditions (General)," a non-punitive characterization, is related to a claim of UCI let alone how it was reasonably raised by the record. (App. Mot, Appendix E.) Notably, with the use of the word "potentially," Appellant seems to concede the link does not exist. (App. Mot. at 1.)

Appellant failed to show that the proffered documents are "necessary for resolving issues raised by materials in the record." Jessie, 79 M.J. at 444-45.

Conclusion

For these reasons, the United States respectfully requests this Honorable Court deny Appellant's Motion to Attach.

[redacted]S, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 Janua1y 2025.

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Militaiy Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40507**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jorge A. ARIZPE	)	
Major (0-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 14 January 2025, Appellant submitted a motion to attach the following documents to the record: (1) Colonel DD board of inquiry testimony transcript; (2) declaration of Area Defense Counsel, (3) page 1 from the record of board proceedings; (4) Major Arizpe's retirement application; (5) Major Arizpe's Form DD-214.

The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, and the applicable law. The court grants Appellant's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 23d day of January 2025,

ORDERED:

Appellant's Motion to Attach is **GRANTED.**

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	14 January 2025
Appellant	)	

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

Assignments of Error

I.

Whether the findings of guilty to Charges II and III are legally and factually sufficient.

II.

Whether the Government can prove 18 U.S.C. § 922 is constitutional as applied to Major Arizpe by "demonstrating that it is consistent with the nation's historical tradition of firearm regulation" when Major Arizpe was convicted of non-violent offenses and this court can decide that question.

III. [1]

Major Arizpe's constitutional rights were violated by being convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt.[2]

IV.

Whether unlawful command influence tainted preferral in Major Arizpe's case because the Staff Judge Advocate pulled the allegations up to the Group Commander after the Squadron Commander wanted to issue a Letter of Reprimand.

[1] Issue III and IV are raised in Appendix A in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

[2] The defense raises this assignment of error for issue preservation purposes.

Statement of the Case

On 13 January 2023, a panel of officer members sitting as a general court-martial (GCM) convicted Major (Maj) Arizpe, contrary to his pleas, of one charge and specification of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920,[3] against LW; and one charge and specification of Article 133, UCMJ, 10 U.S.C. § 933, against SM. R. at 1006;[4] Entry of Judgment [EOJ]. Maj Arizpe was acquitted, consistent with his pleas, of one charge and specification of Article 92, UCMJ, 10 U.S.C. § 892. *Id.* The military judge sentenced Maj Arizpe to a reprimand, to forfeit $1,200.00 of his pay per month for two months, and to 35 days of confinement for the Article 120 charge and specification.[5] R. at 1045; EOJ. The convening authority took no action on the findings or sentence and denied Maj Arizpe's request for deferment of all adjudged forfeitures until the EOJ. Convening Authority Decision on Action. The convening authority stated the denial was because of the "nature of the offenses" and because Maj Arizpe's "matters fail[ed] to demonstrate his service record or a need in his family situation that justifies a deferment of the adjudged forfeitures." *Id.*

Statement of the Facts

LW was assigned to the 48th Medical Group as a clinical nurse on the multi-service unit in August 2020. R. at 653. She then moved to be the executive officer for the Group Commander starting in April 2021. R. at 654. LW met Maj Arizpe in November 2020 when he arrived to the 48th Medical Group multi-service unit as a nurse. R. at 655. They saw each other at work and

[3] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are those found in the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].
[4] All record (R.) citations are to the Government's Motion to Attach Appendix A—GCM Verbatim Transcript without Sealed Materials.
[5] The military judge did not adjudge confinement for the Article 133, UCMJ, offense. R. at 1045; EOJ.

then during group hangouts starting in 2021. *Id.* Maj Arizpe was accused of touching LW's buttock in July 2021 with his hand while they were hugging after one of their regular get togethers with friends. Report of Investigation (ROI) at 4; Charge Sheet. About a month later, SM, a civilian who worked in the 58th Medical Group, alleged she felt uncomfortable as a result of a couple of comments made by Maj Arizpe during a work conversation. ROI at 15. After both incidents were investigated, Colonel (Col) DD, the Health Care Operations Squadron Commander and Maj Arizpe's commander (R. at 742), determined Maj Arizpe should be given a Letter of Reprimand (LOR). Motion to Attach, Colonel DD Board of Inquiry (BOI) Testimony Transcript,[6] Appendix B [Appendix B] at 3, 14 January 2025. Col DD took into consideration Maj Arizpe "back[ed] off when the person did not indicate an interest" along with Maj Arizpe's long service in the Air Force. Appendix B at 4. The Staff Judge Advocate (SJA), 48th Fighter Wing (USAFE), disagreed and wanted a court-martial. Charge Sheet; Appendix B at 4. Col DD was removed from the ultimate disposition of the case because he did not agree to the court-martial. Appendix B at 5. Instead, the SJA went to the 48th Medical Group Commander, Col CB, to get him to pull the case up to his level. *Id.* Knowing the immediate commander wanted to issue an LOR, the SJA called Maj Arizpe's Area Defense Counsel (ADC) and said they were looking at a GCM. Motion to Attach, ADC Declaration, Appendix C [Appendix C] at 1, 14 January 2025. The SJA informed the ADC that unless Maj Arizpe wanted to go to a GCM, he needed to accept an Article 15, UCMJ, and waive a Board of Inquiry (BOI). *Id.* The SJA indicated there was little to no negotiation room. *Id.* Col DD was not surprised that Col CB agreed to prefer charges, because he was known for going along with what legal recommended. Appendix B at 5. Col DD was surprised, however,

[6] A BOI was initiated against Maj Arizpe after the GCM did not adjudge a punitive discharge. Col DD testified at the BOI and Appendix B is a copy of that testimony.

Col CB agreed to a GCM for the level of infractions as a GCM was "overkill." *Id.* While Col DD did not question whether the touch of the buttock happened or the comments were made, he was surprised by the level of punishment—30 days in jail to him "was pretty harsh to be forthright." Appendix B at 5-6.

After not receiving a punitive discharge at the GCM, Maj Arizpe's later commander initiated a BOI, which was held 13-14 February 2024. Motion to Attach, Record of Board Proceedings Page 1, Appendix D [Appendix D], 14 January 2025. Col DD testified, which is the source of his testimony described above. Appendix B. Col DD testified he did not believe Maj Arizpe should be discharged, especially given both Maj Arizpe's decorated military service and the fact that the court-martial did not dismiss him. Appendix B at 8; PE 5-6. Col DD also believed it to be excessive to deprive Maj Arizpe of his retirement as he had been sufficiently held accountable. Appendix B at 9. The state of Texas licensing board or nursing board looked at the case and did not believe it rose to the level of suspension or revocation of Maj Arizpe's license. *Id.* Additionally, no action was taken against Maj Arizpe's security clearance. Appendix B at 10. For Col DD, the issue was degree of punishment. Appendix B at 13. He felt the prosecution was maliciously vindictive and excessive because Maj Arizpe's service record included acting with heroism, valor, and faithful heroic service as compared to one night where Maj Arizpe and LW were drinking and, in Col DD's opinion, Maj Arizpe made a move. Appendix B at 24; PE 5-6. Maj Arizpe's retirement criteria accrued on 25 October 2024, but he was separated from the Air Force on 23 October 2024—two days before. Motion to Attach, Maj Arizpe's Retirement Application, Appendix E [Appendix E], and Maj Arizpe's DD 214, Appendix F [Appendix F], 14 January 2025.

1. LW received counseling for underperforming as the executive officer to the Deputy Group Commander. Then, after learning she wasn't getting the deployment she wanted, LW told her leadership that Maj Arizpe assaulted her.

At the time of the allegation, LW was the executive officer for the Deputy Group Commander for the 48th Medical Group, Col MS. R. at 653. LW was struggling in her position with the stress and pressure. R. at 703. Col MS previously counseled LW on a perceived unprofessional relationship with another officer in the Wing—one who worked with the Wing Commander. R. at 885. There was a rumor that LW was having an affair with the Group Commander's executive officer. R. at 894. Col MS's opinion of LW was that she had a character trait for being dramatic. R. at 885. LW was an attention seeker and liked to be in the spotlight. *Id.* LW lacked credibility with Col MS also because LW took several months to get spun up on her job. R. at 887. She was hired in March/April 2021. *Id.* Yet, it took a number of months for her to get the hang of the job. R. at 889. LW continued to make the same mistakes over and over and she had to be redirected on what she was missing and how to correct her mistakes. *Id.* Col MS noticed LW's dramatic behavior when Col CB arrived in late June and took command of the medical group. R. at 890. Col MS informed Col CB that LW may not be able to stay in the exec position, but Col CB wanted to give LW time. *Id.* Col MS previously told LW that the person she had assigned to help LW in the exec position would no longer be assisting her, because she had to go back to the group staff. R. at 890-91. At that point in July, LW understood that her job would all be on her. R. at 891.

In the August 2021 timeframe, LW was struggling more. R. at 891. A humanitarian effort came up and Col MS asked LW if she was deployment ready and LW said "Absolutely. I can go." *Id.* Col MS asked Col CB about LW deploying, but Col CB said LW was having personal issues and he did not want her to go. R. at 892. Col MS informed LW that Col CB did not want her to

go and LW got very upset and mad. *Id.* From that point on, LW was dramatic, emotional, and distracted. *Id.* Not long after being denied the deployment, LW called Col MS and Col CB and told them why she could not focus on her job. *Id.* LW said she had been assaulted. R. at 892-93.

While the above information was presented in a hearing outside the presence of the members, when asked about being counseled in front of the members, LW said she did not recall if the Deputy Group Commander communicated concerns to her about her performance. R. at 702. LW was asked a second time, "You don't have any knowledge or memory of any counselings regarding allegations concerning any deficiencies at work?" *Id.* LW responded, "I don't recall. Most of our conversations, if they were, I considered them more mentorship than counseling." R. at 703. After being counseled by Col MS, LW went on leave and after returning from leave—approximately three weeks later, LW made the allegation and sought a military protective order (MPO).[7] R. at 702.

2. LW hung out and hugged on occasion. After later receiving counseling, LW alleged Maj Arizpe touched her buttock with his hand during a hug.

Maj Arizpe and LW worked in the same unit together. R. at 655. The two of them attended group hangouts starting in 2021 where they would get together for dinners and decompress outside of work. R. at 655-56. Typically, during these hangouts, the group would use humor—banter, witty humor, and even crude humor—to decompress. R. at 662. LW also invited Maj Arizpe to get coffee with her. R. at 699. They would text about personal things as well as professional. *Id.*

On 24 July 2021, Maj Arizpe hosted a dinner at his house with four people in attendance to include LW and BA, who was also an active-duty member assigned to the 48th Medical Group multi-service unit. R. at 658-59; 720. LW was on leave at that time. R. at 660-61. As an example

[7] Charge I alleged Maj Arizpe violated the MPO, but the members acquitted him of this offense. Charge Sheet; R. at 1006.

of the crude humor used, that night Maj Arizpe texted LW asking where she was and if she was doing pre-labor activities. R. at 663. When she read it out loud at the get together, Maj Arizpe simulated humping the air and LW joked back that she was aware of what pre-labor activities meant. *Id.*

At the end of the night, Maj Arizpe, LW, and BA went into the kitchen to put the dishes in the sink and say goodbye. R. at 667. When BA was turned towards the sink, Maj Arizpe and LW hugged. *Id.* It was ordinary for him to give her a hug to say goodbye. R. at 704. LW alleged that during the hug, Maj Arizpe used his left hand to grab her right butt cheek. R. at 668. LW had her phone in her right, back pocket at the time. R. at 675. LW said she pushed away from him and said, "Okay. That's enough." R. at 668. In response, Maj Arizpe laughed and said, "You know I just had to try." *Id.* Maj Arizpe went in for a second hug and LW claims she "froze" and they hugged a second time. *Id.*

BA testified he heard Maj Arizpe say something to the effect of, "Oh, I thought I would try." R. at 727. When BA turned around after washing his hands, he did not notice anything in particular about Maj Arizpe and LW's hug. R. at 727-28. LW gave BA a look that BA interpreted as her indicating she wanted to leave. R. at 728. Earlier in the evening when the jokes turned more crude and towards LW, at no point did LW ask for the joking to stop. *See* R. at 733-35. Instead, LW tried to deflect and act normal. R. at 734-35. At the end of the night, BS and LW shared a look at some point indicating they should leave. R. at 726, 728.

3. SM regularly had personal conversations with Maj Arizpe, but on this one occasion she felt uncomfortable with his comment.

SM and Maj Arizpe first worked in the medical group together in July 2021. R. at 794. In mid-August they began working more closely together. R. at 796-97. SM shared personal details like her parents having gotten divorced before she and her husband moved to RAF Lakenheath,

United Kingdom. R. at 798. SM talked about her three kittens and her husband. The two also talked about how Maj Arizpe liked to bake. *Id.* SM viewed Maj Arizpe as a father figure. *Id.* At one point, SM's eyes had been red for several weeks due to her contacts and Maj Arizpe said, "I feel like I'm your father telling my daughter to go get her eyes checked." R. at 798-99. On 13 September 2021, Maj Arizpe asked about her weekend, and she shared she had gone to a crud tournament. R. at 800. She had also gone to a ball pit club with her best friend who was getting a divorce and wanted to go out one last time before being sent back to America. *Id.* SM showed Maj Arizpe pictures of her in the ball pit, pictures of her with her friends, and a boomerang video of her throwing balls up in the ball pit. *Id.* These types of interactions were normal for the two of them. R. at 801.

About a couple hours after that interaction, Maj Arizpe came back to SM's room and said, "[SM], I love you" to which SM said, "What do you want," understanding "when someone says that to you, they want something from you." R. at 803. Maj Arizpe responded, "Oh, you know me so well." *Id.* Maj Arizpe was going to be in a meeting until lunchtime, so he gave SM's number to another person in the clinic in case they needed anything. *Id.* SM indicated that was okay and then looked in the telephone consult box to see if anything needed to be addressed and replied, "Oh, wow. This looks really good. You have cleaned it up really good." *Id.* SM testified that Maj Arizpe responded, "[SM], I'm going to tell you something that may make you uncomfortable," or "look at me differently or cringe, but you are the type of girl I usually go after. But I know there's this line here." R. at 803-04. SM said Maj Arizpe then indicated with his hands that he was drawing a line and then added, "and I know not to cross it." R. at 804. SM stared at her computer at that point not making eye contact. R. at 805-06. Maj Arizpe then allegedly said, "See, I knew I shouldn't have said anything because now you won't even look at me." R. at 805.

SM then went to the sergeant at the front desk and told her what was said. R. at 807-08. The sergeant told SM, "[SM], that's reportable." R. at 808. The incident was reported to Col DD. R. at 839. Col DD brought both Maj Arizpe and SM into his office to address the comments and to garner context. ROI at 15-16. Col DD believed an LOR was an appropriate level for the conduct. Appendix B at 3.

4. Col DD wanted to issue an LOR, but the SJA said the case needed to be a GCM. When Col DD disagreed, the SJA went to Col CB to pull the case up to his level and then pressured the ADC to take a deal.

When Col DD refused to prefer charges, the SJA went to the 48th Medical Group Commander, Col CB, to prefer charges. Appendix B at 5. LW was the executive officer to Col CB at the time. R. at 654, 890; ROI at 9. This issue was not litigated below as further information was not discovered until Col DD testified at Maj Arizpe's BOI. Appendix B.

Argument

I.

The findings of guilty to Charges II and III are legally and factually insufficient.

Standard of Review

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

Law and Analysis

The previous test for factual sufficiency was "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). For offenses occurring after 1 January 2021, the UCMJ specifies

this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (Manual for Courts-Martial, United States (2024 ed.) (2024 *MCM*)). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding."[8] Article 66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii) (2024 *MCM*). The CAAF held "weight of the evidence" and "clearly convinced" do not change the burden of proof beyond a reasonable doubt given the quantum of proof required to sustain a conviction is the same. *United States v. Harvey*, _M.J. _, No. 23-0239/NA, 2024 CAAF LEXIS 502, at *10-12 (C.A.A.F. Sept. 6, 2024). The standards for factual sufficiency review under the new statutory language are still not settled. As such, the CAAF granted review in *United States v. Csiti*, _M.J. _, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024) (mem.), *United States v. McLeod*, _M.J. _, No. 24-0189/AF, 2024 CAAF LEXIS 530 (C.A.A.F. Sep. 12, 2024) (mem.), and *United States v. Zhong*, __M.J. _, No. 25-0011/AF, 2024 CAAF LEXIS 812 (C.A.A.F. Dec. 16, 2024) (mem.).

The test for legal sufficiency is after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements" beyond a reasonable doubt. *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting Rosario, 76 M.J. at 117).

1. Charge II is legally and factually insufficient.

The elements of abusive sexual contact committed without consent are: (1) that the accused

[8] This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024), *petition granted*, __ M.J. __, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024). [As noted above the CAAF decided *Harvey* on Sept. 6, 2024.]

committed sexual contact upon another person; and (2) that the accused did so without the consent of the other person. 2019 *MCM*, ¶ 60.b.(4)(d). The definition of sexual contact includes touching the buttocks of any person "with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." 2019 *MCM*, ¶ 60.a.(g)(2). Therefore, the Government had to prove beyond a reasonable doubt that Maj Arizpe touched LW's buttock without her consent and with the intent to gratify his sexual desires. Charge Sheet; R. at 935. They failed to do so. First, because the Defense raised mistake of fact as to consent[9] and the Government failed to prove that Maj Arizpe did not have a reasonable mistaken belief that LW consented to the butt touch. Second, because the Government failed to prove that the butt touch over LW's phone was done with an intent to gratify his sexual desire.

Maj Arizpe and LW had gone to dinner parties with friends previously on multiple occasions. R. at 655-56. As part of these group events, it was customary to hug to say goodbye. R. at 704. On the night in question, Maj Arizpe was hosting the group of four at his house. R. at 658-59. They were all making crude jokes throughout the evening. R. at 662-63, 733-35. Maj Arizpe had even made a joke to LW prior about her being late and whether that was due to pre-labor activities. R. at 663. LW read the text aloud to the group and Maj Arizpe mimed a hip-thrusting action to which LW said she knew what pre-labor activities were. *Id.* Later when one friend had left and only Maj Arizpe, LW, and BS remained outside, the conversation continued with crude jokes, many of which were directed at LW. R. at 733-35. At no point did LW say stop or indicate she did not appreciate or want the jokes directed at her anymore. The only indicator of uncomfortable feelings was LW and BS making eye contact indicating it was time to leave. R. at 726, 728. The Government did not prove beyond a reasonable doubt that Maj Arizpe did not have

[9] The military judge instructed on mistake of fact as well. R. at 939.

a reasonable mistake of fact as to LW consenting to Maj Arizpe making a "move" or advance on her.

The Government also did not prove beyond a reasonable doubt that this move or advance on LW in the form of touching her phone and right butt cheek at the same time was done with an intent to gratify his sexual desires. Even assuming the butt touch happened, it was done to assess LW's interest in Maj Arizpe—not to gratify his sexual desires. Maj Arizpe's comment after the incident that he had to try was indicative of him believing both that it was okay to make a move (i.e. she consented to the attempt to make a move) and that it was a way for him to see if LW was interested in him as he thought. There was no grinding, moaning, or sexual statements said during the hug and butt touch over her phone. There was nothing to indicate he was gratifying his sexual desires during this interaction. Maj Arizpe did not engage in devious sexual conduct, nor did he obtain sexual gratification. Rather, his slight touch was a meager attempt, based on the circumstances he reasonably perceived that night, to try to see if LW was interested in him. As noted above, the evidence presented at trial, at best, might have sustained a charge of an assault consummated by a battery given LW's testimony, but there was no sexual gratification involved. Maj Arizpe has made a specific showing of a deficiency in proof and this Court should be clearly convinced that the finding of guilty was against the weight of the evidence. Article 66(d)(1)(B). Moreover, even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found Maj Arizpe both did not have a reasonable mistake of fact and that the butt touch over LW's phone was done with the intent to gratify his sexual desires. *Robinson*, 77 M.J. at 297-98.

2. Charge III is legally and factually insufficient.

The elements for conduct unbecoming an officer and a gentleman are: (1) that the accused

did or omitted to do a certain act; and (2) that, under the circumstances, the act or omission constituted conduct unbecoming an officer and gentleman.[10] 2019 *MCM*, Pt. IV, ¶ 90.b. Specifically, the Government charged Maj Arizpe with becoming unduly familiar with SM, "a subordinate married woman, by making unwanted and inappropriate comments to her in the workplace, including: 'I love you,' and 'You are my type of girl I usually go after,' or words to that effect, which conduct was unbecoming an officer and a gentleman." Charge Sheet; R. at 941. As to the first comment, SM admitted the "I love you" comment was said in jest like a predicate to asking for a favor. R. at 803. This was not conduct unbecoming an officer and gentleman, i.e. "dishonoring or disgracing the person as an officer, seriously compromis[ing] that officer's character as a gentleman, or . . . the person's standing as an officer." Pt. IV, ¶ 80.c.(2), 2019 *MCM*. Maj Arizpe and SM were in a working relationship and while Maj Arizpe was her secondary supervisor, it was clear to both that the "I love you" statement was a joke to set up a request for help in a task. While "there are certain moral attributes common to the ideal officer and the perfect gentleman. . . not everyone is or can be expected to meet unrealistically high moral standards." *Id.* Understanding "there is a limit of tolerance . . . an officer cannot fall below without seriously compromising the person's standing as an officer," that is not what we have in this case. *Id.* The second comment Maj Arizpe made was combined with the statement that there is a line and that he would not cross it. R. at 803-04. SM said afterwards Maj Arizpe said he knew he should not have said the comment, which indicates some error, but that is not conceding it was conduct unbecoming an officer and a gentleman.

Maj Arizpe has made a specific showing of a deficiency in proof—that the conduct raised

[10] Section 542 of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 542(a), 135 Stat. 1709 (2021), amended Article 133, UCMJ, to remove the words "and a gentleman."

did not rise to the level of unbecoming an officer and a gentleman. Article 66(d)(1)(B)(i), UCMJ. This Court should be clearly convinced that the finding of guilty was against the weight of the evidence and should dismiss, set aside, or modify the finding. Article 66(d)(1)(B)(iii). Also taking the conversation as a whole and even viewing in the light most favorable to the prosecution, no rational trier of fact could have found this conversation to be unbecoming an officer and gentleman beyond a reasonable doubt. *Robinson*, 77 M.J. at 297-98.

WHEREFORE, Maj Arizpe respectfully requests that this Honorable Court set aside the findings of guilty to Charges II and III, dismiss those charges, and set aside the sentence.

II.

The Government cannot prove 18 U.S.C. § 922 is constitutional as applied to Major Arizpe by "demonstrating that it is consistent with the nation's historical tradition of firearm regulation" when Major Arizpe was convicted of non-violent offenses and this court can decide that question.

Additional Facts

After his conviction, the Government determined that Maj Arizpe's case met the firearm prohibition under 18 U.S.C. § 922. EOJ. The Government did not specify why or under which section his case met the requirements of 18 U.S.C. § 922.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law and Analysis

1. Section 922's firearms ban cannot constitutionally apply to Maj Arizpe.

Maj Arizpe faces a lifetime ban on possessing firearms—despite a constitutional right to

keep and bear arms—for touching LW's buttock with his hand and becoming unduly familiar with SM. EOJ. The Government cannot demonstrate that such a ban, even if it were limited temporally, is "consistent with the nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 579 U.S. 1, 24 (2022).

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."

Id. (quoting *United States v. Konigsberg*, 366 U.S. 36, 50 n.10 (1961)).

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 Maj Arizpe, who stands convicted of nonviolent offenses. 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 is, 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. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). 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. For example, under the 1926 Uniform Firearms Act, 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 (cleaned up) (citing Uniform Act to

Regulate the Sale & Possession of Firearms (Second Tentative Draft 1926)). Maj Arizpe's conduct falls completely outside these categories. 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 Section 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 State*s, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration considering *United States v. Rahimi*, 602 U.S. __, 2024 U.S. LEXIS 2714 (June 21, 2024)). Evaluating Section 922(g)(1) and considering *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 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In light of *Bruen*, Section 922 is unconstitutional as applied to Maj Arizpe.

2. This Court may order correction of the EOJ.

The CAAF in *Williams* held that it was ultra vires for a Court of Criminal Appeals (CCA) to modify the statement of trial results to change sex offender registry using its power under Article 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019–2022). *United States v. Williams*, _M.J._, 2024 CAAF LEXIS 501, at *14–15 (C.A.A.F. Sep. 5, 2024).[11] The CAAF did not foreclose properly

[11] Maj Arizpe acknowledges the CAAF's holding in *Williams*, but nevertheless maintains his argument, for the purpose of preserving the issue, that a CCA can modify the STR and EOJ to correct errors in applying 18 U.S.C. § 922.

raising an erroneous firearm notation to the service courts of appeal under Article 66(d)(2), UCMJ, when the error raised occurs *after* the entry of judgment, as in Maj Arizpe's case. Unlike the appellant in *Williams*, Maj Arizpe meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ. First, Maj Arizpe is demonstrating error in his case—that he was erroneously and unconstitutionally deprived of his right to bear arms—in this brief to this Court. Maj Arizpe is asking for correction of the EOJ, which includes the First Endorsement with the erroneous firearm bar. This requested remedy is in line with *Williams*. While this Court cannot correct the erroneous firearms ban associated with the STR, it *can* correct the erroneous firearm notation on the First Endorsement attached to the EOJ, which was completed after the entry of judgment during post-trial processing. *Williams*, __M.J. __, 2024 CAAF LEXIS at *14-15.

Second, the error on the First Endorsement erroneously depriving Maj Arizpe of his constitutional right to a firearm was an error in the "processing of the court-martial after the judgment was entered into the record under section 860(c) . . . (article 60(c))." Article 66(d)(2), UCMJ. Under the applicable Air Force regulation, "*[a]fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* ¶ 20.41 (Apr. 14, 2022) (emphasis added). The firearm denotation on the First Indorsement that accompanies the entry of judgment into the record of trial explicitly happens *after* the entry of judgment is signed by the military judge pursuant to Article 60(c), UCMJ. *Id.*

Finally, this Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is not foreclosed by this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671 (A.F. Ct. Crim. App. 2024). In *Vanzant*, this Court determined it did not have authority to act

on collateral consequences not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id.* at 680 ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The CAAF agreed with this interpretation. *Williams*, __ M.J. __, 2024 CAAF LEXIS at *11-13. However, Maj Arizpe is asking this Court to review an error in post-trial processing under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See* 84 M.J. at 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)). To effectuate any remedy, this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction, as, ultimately, the First Endorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects Maj Arizpe's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41

WHEREFORE, Maj Arizpe respectfully requests that this Honorable Court set aside his convictions to Charges II and III and set aside his sentence.

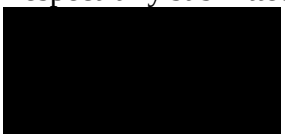
Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 January 2025.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Maj Arizpe, through appellate defense counsel, personally requests that this Court consider the following matters:

III.

Maj Arizpe's constitutional rights were violated by being convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt.

Additional Facts

While delivering findings instructions, the military judge informed the members, "The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have 8 members, that means 6 members must concur in any finding of guilty." R. at 994. The members found Maj Arizpe guilty of Charges II and III. R. at 1006. It is unknown and unknowable whether that conviction was unanimous.

Standard of Review

The standard of review for questions of constitutional law is *de novo*. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

Law and Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Maj Arizpe acknowledges that, absent intervening CAAF or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, Maj Arizpe maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

WHEREFORE, this Honorable Court should reverse the findings of guilty and the

sentence and remand this case for further proceedings at which Maj Arizpe may be found guilty only upon a unanimous vote of the court-martial members.

IV.

Unlawful command influence tainted preferral in Major Arizpe's case because the Staff Judge Advocate pulled the allegations up to the Group Commander after the Squadron Commander wanted to issue a Letter of Reprimand.

Standard of Review

Allegations of unlawful command influence are reviewed de novo. *United States v. Gilmet*, 83 M.J. 398, 403 (C.A.A.F. 2023) (citing *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018)).

Law and Analysis

After being amended by the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532, 133 Stat. 1198, 1359-61 (2019), Article 37(c), UCMJ, now reads, "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." 10 U.S.C. § 837(c). However, Article 37(a)(5)(B) states, "No superior convening authority or officer may direct a subordinate convening authority or officer to make a particular disposition in a specific case or otherwise substitute the discretion of such authority or such officer for that of the subordinate convening authority or officer." 10 U.S.C. § 837(a)(5)(B). Additionally, Article 37(d)(2) asserts that, "Except as provided in paragraph (1) or as otherwise authorized by this chapter, a superior convening authority or commanding officer may not limit the discretion of a subordinate convening authority or officer to act with respect to a case for which the subordinate convening authority or officer has authority to dispose of the offenses." 10 U.S.C. § 837(d)(2).

1. The SJA committed actual UCI.

"Ordinarily the immediate commander of a person accused or suspected of committing an

offense triable by court-martial initially determines how to dispose of that offense." R.C.M. 306(a). Maj Arizpe's immediate commander was Col DD, who believed an LOR was the appropriate level to dispose of the allegations. Appendix B at 5. In Col DD's view, Maj Arizpe made a move on LW. *Id.* Maj Arizpe's interest was not returned, so he backed off. *Id.* Col DD believed the "move" was inappropriate, but also found that an LOR was an appropriate level to match the infraction and a GCM was "overkill." *Id.* This was not a case where a superior commander withheld the authority of disposing of the allegations in the case.[12] *See* R.C.M. 306. As such, "[a] superior commander may not limit the discretion of" Col DD to act on Maj Arizpe's case. *Id.*

The President of the United States has directed that "[a]llegations of offenses should be disposed of . . . at the lowest appropriate level of disposition." R.C.M. 306(b). The lowest appropriate level of disposition in Maj Arizpe's case was an LOR, just as Col DD intended. *See* R.C.M. 306(c)(2) ("A commander may take or initiate administrative action . . . such as . . . reprimand."). Col DD did not forward the matter to a superior authority for disposition (R.C.M. 306(c)(5)); instead, the SJA went over the immediate commander's head. Col DD made clear he believed the allegations were appropriately handled with an LOR. Appendix B at 5. After presenting more than mere allegations or speculation (*see* Appendix B) the Government must prove beyond a reasonable doubt that the UCI did not affect the proceedings. *Gilmet*, 83 M.J. at 403.

A prima facie claim of actual UCI is established by the accused by showing "some

[12] The alleged offenses were not "certain sex-related offenses" withheld from all commanders who are not at least special court-martial convening authorities in the grade of at least O-6. R.C.M. 306(a), Discussion. Further, no superior convening authority or commanding officer withheld authority under Article 37(d)(1), UCMJ, 10 U.S.C. § 837(d)(1).

evidence" of UCI, facts of which if true would constitute UCI. *Gilmet*, 83 M.J. at 403 (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). While the initial burden is low, Maj Arizpe has presented "more than mere allegations or speculation," as Col DD testified under oath at Maj Arizpe's BOI that he wanted to issue an LOR and did not want to prefer charges. *Id.*; Appendix B at 3-4. Further, just as the appellant in *Gilmet* presented some evidence in the form of affidavits, so too has Maj Arizpe. 83 M.J. at 403; Appendix B. The Government now cannot meet its burden of proving beyond a reasonable doubt that the SJA's intervening actions did not affect the proceedings in Maj Arizpe's case. *See Gilmet*, 83 M.J. at 403 ("Once the accused satisfies his burden, the burden shifts to the Government to prove beyond a reasonable doubt that the UCI will not affect the proceedings."). Absent the SJA's actions, Maj Arizpe's immediate commander, Col DD, would have issued him an LOR, which was the "lowest appropriate level of disposition." Appendix B at 3-5; *see* R.C.M. 306(b). At a minimum, the SJA's actions constituted maliciously vindictive prosecution. Appendix B at 24. The SJA wanted a GCM, or at least the weight of the threat of a GCM as negotiation power in getting Maj Arizpe to accept—not challenge—an Article 15, UCMJ, and waive a BOI.

When Col DD did not give him that power, the SJA went over his head to Col CB who was known for going along with whatever the legal office said to do. Appendix B at 5. Never mind that LW had motive to lie or exaggerate what happened. Further, essentially what LW alleged was that after a night of crude jokes between friends, Maj Arizpe touched her right butt cheek—over her phone—during a hug goodbye. Then, after she pulled away, LW consented to a second hug. The decision to charge this case as an Article 120, UCMJ, violation was prosecutorial overreach.

2. Maj Arizpe was prejudiced, but this Court should still consider the fact that the SJA committed apparent UCI.

Maj Arizpe is afforded relief based on actual UCI because he was prejudiced. However, should this Court not find actual UCI, Maj Arizpe asks that it find apparent UCI. The SJA's actions taken as a whole placed an "intolerable strain on the public's perception of the military justice system." *Gilmet*, 83 M.J. at 401 n.2. The SJA took the decision to remove Maj Arizpe's case from his immediate commander because Col DD wanted to handle the case with an LOR—the lowest appropriate level of disposition. The SJA then went to the Group Commander to get him to prefer charges. Appendix A at 5. And while Col DD wanted to issue an LOR and the SJA knew the commander's intention, nevertheless, the SJA contacted Maj Arizpe's Area Defense Counsel to broker a deal to either agree to accept an Article 15, UCMJ, and waive a BOI or go to a GCM. Appendix B. The vindictive prosecution took low level infractions with a complaining witness who had a motive to lie given she had previously been counselled about her job performance and pushed them up to the Group Commander to prefer charges. This was the same Group Commander, Col CB, who told Colonel MS that he wanted to give LW another chance at the exec job. The same Group Commander who kept LW from a deployment due to her "personal issues." And the same Group Commander LW called on the phone with Col MS to explain why she'd been doing so poorly at work.

While the Court of Appeals for the Armed Forces (CAAF) did not answer the question of whether apparent UCI still exists as it decided *Gilmet* on the issue of actual UCI, this Court should still conduct the analysis. *Gilmet*, 83 M.J. at 401 n.2. At least one panel of this Court[13] has

[13] The Army Court of Criminal Appeals (ACCA) has reviewed for only actual UCI. *United States v. Coley*, 2024 CCA LEXIS 127, at *24 n.14 (A. Ct. Crim. App. Mar. 13, 2024), *rev. granted* (on other grounds), No. 24-0184/AR, 2024 CAAF LEXIS 683 (C.A.A.F. Nov. 8, 2024) (mem.); *United*

conducted analysis on apparent UCI. *United States v. Zier*, No. ACM 21014, 2024 CCA LEXIS 3 (A.F. Ct. Crim. App. Jan. 5, 2024) (reviewing for apparent UCI, but finding it did not occur); *see also United States v. Serjak*, No. ACM 40392, 2024 CCA LEXIS 524, at *28 (A.F. Ct. Crim. App. Dec. 11, 2024) (stating "this court is now limited to grant relief for apparent UCI without [a]ppellant's demonstration of material prejudice, even if found at trial" (citation omitted)). Unlike in *Zier*, the influence in this case was prior to preferral of charges and applied directly to those involved in the decision. The SJA in Maj Arizpe's case specifically told Col DD that charges needed to be preferred—i.e., the statements made by the SJA were directed to the immediate commander in particular and then later to the Group Commander for the purpose of influencing him to prefer charges. *Compare* Appendix A at 2-5, *with* 2024 CCA LEXIS 3, at *30-31. Another panel of this Court provided "straightforward" analysis that the amendments to Article 37(c), UCMJ, precludes apparent UCI given the UCI must result in "material prejudice [to] the substantial rights of the accused." *In re Vargas*, 84 M.J. 734, 740-41 (A.F. Ct. Crim. App. Aug. 15, 2024) (quoting Article 37(c), 10 U.S.C. § 837(c) pursuant to changes from the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532, 133 Stat. 1360

States v. Davis, 2024 CCA LEXIS 259 (A. Ct. Crim. App. Jun. 24, 2024). The Coast Guard Court of Criminal Appeals (CGCCA) avoided the question of whether apparent UCI still exists, but confirmed it is still open. *United States v. Lopez*, 2024 CCA LEXIS 278, at *11 (C.G. Ct. Crim. App. Jul. 11, 2024) *rev. granted* (on other grounds), No. 24-0226/CG, 2024 CAAF LEXIS 811 (C.A.A.F. Dec. 16, 2024) (mem.). Finally, the Navy-Marine Court of Criminal Appeals (NMCCA) stated in 2021 that it is statutorily barred from holding the findings or sentence were incorrect on the grounds of apparent UCI given the revision to Article 37, UCMJ, but in arguendo, assessed for and found no apparent UCI. *United States v. Gattis*, 81 M.J. 748, 757 (N-M. Ct. Crim. App. 2021). Later in 2022, the NMCCA decided *Gilmet*. No. 202200061, 2022 CCA LEXIS 478, at *14 (N-M. Ct. Crim. App. Aug. 15, 2022). Then in 2024, the NMCCA stated that while Article 37, UCMJ, terminated the concept of apparent UCI, it found "no objective, disinterested observer, fully informed [of] all the facts and circumstances, would harbor a doubt about the fairness of the proceedings." *United States v. Chisolm*, No. 202300144, 2024 CCA LEXIS 525, at *15 n.51 (N-M. Ct. Crim. App. Dec. 16, 2024) (referencing *Gattis*, 81 M.J. at 757).

(2019)). As noted by this Court, this is a question the CAAF has not reached as of yet. *Id.* at 740 (referencing *Gilmet*, 83 M.J. at 401 n.2).

As stated above, Maj Arizpe has presented at least "some evidence" that UCI occurred and the Government cannot prove beyond a reasonable doubt that (a) the predicate facts do not exist, or (b) the facts as presented do not constitute UCI. Nor can the Government prove beyond a reasonable doubt that the UCI "did not place an intolerable strain on the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceedings." *Id.* (internal citations omitted). Not only did the SJA get the Group Commander to pull the case from the immediate commander best inclined to determine the appropriate action necessary, he pressured the ADC to make a deal. When that didn't happen, the SJA had the Group Commander prefer an abusive sexual assault charge against Maj Arizpe. Charge Sheet. Then when the court did not adjudge a punitive discharge, a BOI was initiated against Maj Arizpe. Appendix D. And two days before he was set to initiate his retirement, Maj Arizpe was separated from the Air Force—at 19 years, 11 months, and 29 days of service. Appendix E-F.

3. Maj Arizpe did not waive review of the question of whether UCI affected his court-martial.

The Defense did not raise a motion regarding UCI. However, the extent of the SJA's intervening in Maj Aripze's case was not apparent until after the GCM. The SJA's pressure became clear when Col DD testified at Maj Arizpe's BOI. Appendix A. As such, Maj Arizpe did not waive the issue of UCI. *See United States v. Suarez*, __M.J. __, No. 25-0004/MC, 2024 CAAF LEXIS 682 (C.A.A.F. Nov. 8, 2024) (mem.) (ordering review of both whether UCI affected the appellant's court-martial and whether the appellant waived review of whether UCI affected his court-martial); *see also United States v. Cunningham*, 83 M.J. 367, 374 (C.A.A.F. 2023) (finding

express waiver when trial defense counsel did not just fail to object, but affirmatively declined to object when specifically asked by the military judge).

WHEREFORE, Maj Arizpe respectfully requests this Honorable Court set aside his convictions to Charges II and III and set aside his sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR LEAVE TO FILE A REPLY TO APPELLEE'S OPPOSITION TO MOTION TO ATTACH**
v.	)	Before Special Panel
Major (O-4) **JORGE A. ARIZPE** United States Air Force *Appellant*	)	No. ACM 40507
	)	22 January 2025

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

Appellant, Major (Maj) Jorge A. Arizpe, by and through his undersigned counsel, pursuant to Rule 23(d) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, moves for leave to reply to Appellee's Opposition to Motion to Attach, dated 21 January 2025. Appellee Opp. Appellee argues that Maj Arizpe's Motion to Attach fails under *United States v. Jessie,* 79 M.J. 437 (C.A.A.F. 2020). Appellee Opp. at 1. Maj Arizpe's Motion to Attach requested five documents be attached to the record of trial in support of Issue IV alleging unlawful command influence (UCI) committed by the Staff Judge Advocate (SJA) in his case. Appellant Mot. at 1. Appellee's opposition to the documents is seemingly first grounded on the issue of UCI not being raised by any materials in the record—as it is being "raised for the first time on appeal." Appellee Opp. at 2-3. And second on the fact that only one of the five documents existed at the time of Maj Arizpe's court-martial. *Id.*

As to the first position, *Jessie* does not prohibit consideration of extra-record evidence in UCI cases. *United States v. Tucker*, 82 M.J. 553, 564 (C.G. Ct. Crim. App. 2022). The Coast Guard Court of Criminal Appeals (CGCCA) detailed its reasoning on this issue in *Tucker* by first looking at the history of appellate courts affording special treatment to assignments of error that

would "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States v. Stringer*, 16 C.M.R. 68, 72 (C.M.A. 1954)). Assignments of error, even when not apparent in the record on its face, may also be considered by Courts of Criminal Appeals (CCA) when a manifest miscarriage of justice would otherwise result. *Id.* (citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The CGCCA specifically listed UCI claims as "implicat[ing] fairness, integrity, or public reputation of the proceedings themselves." *Id.* at 565. It went on to quote the court in *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967) (per curiam), stating "command control is scarcely ever apparent on the face of the record." *Tucker*, 82 M.J. at 565. In *DuBay*, the court then "directed the now-familiar process to order an adversarial hearing to supplement the record with appellate fact-finding." *Id.* (citing *DuBay*, 37 C.M.R. at 413).

The CGCCA then directly addressed *Jessie*. *Id.* at 566. *Jessie* did not involve claims related to the court-martial proceedings or "implicate the fairness, integrity, or public reputation of them." *Id. Jessie* involved the question of sentencing relief due to post-trial prison conditions and was limited to the CCA's sentence review under Article 66, Uniform Code of Military Justice (UCMJ).[1] *Id.* (citing 79 M.J. at 440, 443). The CGCCA explained how the "*Jessie* court was careful to explain it was reconciling, not overruling, its past precedents on what to consider in sentence review" and that ultimately allowing extra-record evidence in that regard is distinct from considering it when looking at UCI claims that could seriously affect "the fairness integrity, or public reputation of the proceedings themselves." *Id.*

As to the second point of opposition, Maj Arizpe bears the burden of presenting "some

[1] Of note, unlike claims regarding violations of the Eighth Amendment or Article 55, UCMJ, there are no other venues (such as U.S. district courts) where appellants may seek relief for UCI impacting courts-martial. *See Jessie*, 79 M.J. at 445 (noting the CCA and the parties discussed how inmates tend to have other venues, to include U.S. district courts, for seeking remedies from prison conditions).

evidence" of UCI that is not mere speculation. *United States v. Gilmet*, 83 M.J. 398, 403 (C.A.A.F. 2023). The Board of Inquiry (BOI) testimony of Colonel DD, Maj Arizpe's immediate commander at the time of the allegations, shows Colonel DD wanted to issue a Letter of Reprimand (LOR), but was pressured by the SJA to find a general court-martial (GCM) was appropriate instead. Appellant Mot., Appendix B. While the BOI occurred after the GCM, the testimony regarded the accusatory state of the allegations against Maj Arizpe. The Declaration of the Area Defense Counsel also establishes that Colonel DD believed that an LOR was the most appropriate disposition. Appellant Mot., Appendix C. The Record of Board Proceedings Page 1 provides the dates of the BOI—pursued and handled by the same legal office which the SJA was the boss of—which demonstrates that after the GCM did not sentence Maj Arizpe to a punitive discharge, a BOI was held to discharge him regardless. Appellant Mot., Appendix D. Finally, Maj Arizpe's Retirement Application and DD 214 demonstrate the Government's pursuit of ensuring Maj Arizpe's discharge was processed in time to prevent him from retiring—all for a buttock touch for which Colonel DD believed an LOR was the appropriate level of adjudication. Appellant Mot. Appendixes E-F. "[C]ommand control is scarcely ever apparent on the face of the record," *DuBay*, 37 C.M.R. at 513, but the five documents Maj Arizpe moved to attach provide some evidence beyond mere speculation that the SJA engaged in UCI as it related to the accusatory and adjudicatory stages of Maj Arizpe's case, to include the prejudice he faced as a result.

The Court of Appeals of the Armed Forces (CAAF) regards UCI as "the mortal enemy of military justice." *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018) (quoting *United States v. Kitts*, 23 M.J. 105, 107 (C.M.A. 1986) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986))). As such, protecting courts-martial from improper command influence is imperative. *Id.* This responsibility includes protecting courts-martial from non-command

sources—such as an SJA—of interference. *Id.* Just as the CAAF takes this responsibility seriously as it is fundamental to advancing the public's confidence in the fairness of the military justice system, so too should this Court. *Id.* (quoting *United States v. Harvey*, 64 M.J. 13, 17 (C.A.A.F. 2006)).

WHEREFORE: Maj Arizpe respectfully requests that this Honorable Court grant his Motion to Attach.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

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 January 2025.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Special Panel
Major (O-4) JORGE A. ARIZPE United States Air Force *Appellant.*	)	No. ACM 40507 12 February 2025

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILTY TO CHARGES II AND III ARE LEGALLY AND FACTUALLY INSUFFICIENT.

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. §922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN APPELLANT WAS CONVICTED OF NON-VIOLENT OFFENSES AND THIS COURT CAN DECIDE THAT QUESTION.

III.[1]

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY BEING CONVICTED OF OFFENSES WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY FOR GUILT.

[1] Issue III and IV is raised in accordance with United States v. Grostefon, 12 M.J. 431 (1982).

IV.

WHETHER UNLAWFUL COMMAND INFLUENCE TAINTED PREFERRAL IN APPELLANT'S CASE BECAUSE THE STAFF JUDGE ADVOCATE PULLED THE ALLEGATIONS UP TO THE GROUP COMMANDER AFTER THE SQUADRON COMMANDER WANTED TO ISSUE A LETTER OF REPRIMAND.

STATEMENT OF CASE

On 13 January 2023, a general court-martial composed of officer members found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ. (*Entry of Judgment*, 14 February 2023, ROT, Vol. 1.)[2] Consistent with his pleas, the panel found Appellant not guilty of one charge and one specification of failure to obey a lawful order in violation of Article 92, UCMJ. (*Id.*) The military judge sentenced Appellant to confinement for thirty-five (35) days, forfeitures of $1,200 pay per month for two months, and a reprimand. (*Id.*) The convening authority took no action on the findings and sentence and denied Appellant's request for deferment of the adjudged forfeitures. (*Convening Authority Decision on Action*, 6 February 2023, ROT, Vol. 1.)

STATEMENT OF FACTS

Relevant facts are provided for each issue below.

[2] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the Manual for Courts-Martial, United States (2019 ed.) (MCM).

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR ABUSIVE SEXUAL CONTACT (CHARGE II) AND CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN (CHARGE III) ARE LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

A. Charge II and its Specification, Abusive Sexual Contact.

LW, the named victim in Charge II of Appellant's case, knew Appellant professionally from working at 48th Medical Group (48 MDG) at Royal Air Force (RAF) Lakenheath, United Kingdom. (R. at 655.) She explained that occasionally she and other co-workers, including Appellant, would get together outside of work. (R. at 655-66.) These outings were usually group hangouts, but on occasion, if no one else could make it, it would only be her and Appellant. (R. at 657.) Appellant was fifteen (15) years older than LW, and she did not view these one-on-one hangouts as a "romantic thing." (R. at 657-58.)

On July 24, 2021, a Saturday, Appellant, via Facebook messenger, invited multiple people over to his home for a potluck style dinner. (Id.) Four people, LW, Appellant, Capt BA, and another Major, attended the dinner. (R. at 662.) The plan was to have "fellowship," eat, and relax. (R. at 660.) Sometime after dinner, the other Major left and only LW, Appellant, and Capt BA remained. (R. at 662-64.) At this point, Appellant, who had been drinking wine, was slurring his words and began to make "some potty humor-type remarks" directed at LW; throughout the night LW only had two glasses of wine. (R. at 666, 726.) This made Capt BA uncomfortable and, after making eye contact with LW, they decided it was time to leave. (Id.)

Before they left, everyone went into the kitchen from the backyard to drop off the dinner dishes. (R. at 667.) As Capt BA was washing his hands at the kitchen sink with his back

towards LW and Appellant, Appellant initiated a hug with LW. (R. at 668.) LW testified that while Appellant was hugging her, he "used his left hand and grabbed [her] right butt cheek." (Id.) LW then "pushed him off with both hands and said, 'Okay, that's enough." (Id.) In response, Appellant laughed and said, "You know I just had to try" and came in for a second hug. (Id.) Capt BA who had been at the sink, overheard Appellant make this comment. (R. at 727.) LW froze during the second hug and Appellant "nuzzled" her neck. (R. at 677.) During the second hug, Capt BA, who was done washing his hands, saw that LW was uncomfortable. (R. at 727.) After Appellant pulled away, LW and Capt BA left Appellant's home. (R. at 677.) On the way home, LW told Capt BA that she did not like "drunk Jorge," and that Appellant had grabbed her. (R. at 678.)

LW made an official restricted report on Monday, two days after Appellant's misconduct, and made the report unrestricted a couple of weeks later. (R. at 678-79.) LW testified that she felt violated from Appellant's conduct and he made her feel like she was "a piece of meat" and worthless. (R. at 669, 677.)

B. Charge III and its Specification, Conduct Unbecoming an Officer and a Gentleman.

SM, the named victim in Charge III of Appellant's case, was a dependent spouse who began working at 48 MDG in January of 2021. (R. at 790.) She met Appellant in July of 2021 when he received a permanent change of duty station to RAF Lakenheath and took over the role of flight commander in the Internal Medicine Clinic (Internal Medicine). (R. at 794.) In August of 2021, SM was the only technician in Internal Medicine and, as a result, she worked closely with Appellant as his subordinate. (R. at 796-97.) During the workday, they had professional and personal conversations. (R. at 797.) SM viewed Appellant like a "father figure in a way." (R. at 798.)

On September 13, 2021, a Monday morning, Appellant and SM discussed what they did over the weekend. (R. at 800.) Approximately two hours later, Appellant approached SM and said, "I love you." (R. at 803.) SM took his comment to mean that he wanted something from her, and he did. (Id.) He had given her number to another flight commander so she could respond if something came up while he was in a meeting. (Id.) SM then testified that the conversation took a turn and Appellant said, "[SM], I'm going to tell you something that may make you look at me differently or cringe, but you are the type of girl I usually go after, but I know there is this line here and I know not to cross it." (R. at 803-804.) While Appellant was talking, SM was staring at her computer and did not move to look at him or make eye contact with him. (R. at 804.) Appellant then said, "See, I knew I shouldn't have said anything because now you won't even look at me," laughed and then left the room. (R. at 805.)

SM testified that after Appellant made those comments, she "shut down" and felt confused. (R. at 807.) SM immediately reported Appellant's misconduct to at least four people – an airman at the front desk, her husband, her previous flight commander, and her flight chief. (R. at 808, 824, 826, 830.) Her previous flight commander, Lt Col SA, testified that when she spoke to SM, SM was "very uncomfortable" and "upset." (R. at 840.)

When Appellant returned to the office after his meeting, he tried to speak to SM, but she refused to look at him and kept her replies short. (R. at 826.) Appellant recognized that SM would not make eye contact with him and said, "See you still aren't looking at me." (R. at 827.) He then acknowledged that he "said something wrong that made me feel uncomfortable enough not to look at him." (Id.)

SM testified that Appellant's behavior bothered her because he was her supervisor and someone she was required to work and converse with him every day. (R. at 833.) SM was

ultimately moved to a different clinic so that she would not have to work with Appellant. (R. at 834.) Trial defense counsel did not cross-examine SM. (R. at 835.)

Standard of Review

A CCA "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." 10 U.S.C. § 866(d)(1)(A). If all offenses occurred on or after 1 January 2021,[3] factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 6 September 2024).

If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. The CCA must also give "appropriate deference to findings of fact entered into the record by the military judge." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 2024 CAAF LEXIS 502, *8. Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

Law and Analysis

The panel at Appellant's court-martial correctly found Appellant guilty on the convicted offenses, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to

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

convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

A. The government provided evidence for all elements of the offenses.

1. The evidence demonstrated that Appellant committed abusive sexual contact upon LW without her consent.

The government presented evidence beyond a reasonable doubt to show that Appellant committed abusive sexual contact upon LW without her consent. To prove Appellant committed abusive sexual contact, the government needed to prove that (1) the accused committed sexual contact upon another person, and (2) the accused did so without the consent of the other person. Manual for Courts-Martial, United States, pt. IV, ¶ 60.b.(4)(d). The government did so through eyewitness testimony and Appellant's own statements.

Looking at the first element, the government proved that Appellant committed sexual contact upon LW. Sexual contact means,

> touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

MCM, pt. IV, ¶ 60.a.(g)(2). According to LW's sworn testimony, Appellant hugged her and then "used his left hand and grabbed [her] right butt cheek." (R. at 668.) After LW pushed him away, Appellant responded with "I just had to try." (Id.) Appellant argues that, if the "butt touch happened," it was only done to assess LW's interest in Appellant and not done to gratify his sexual desires. (App. Br. at 12.) LW's testimony and Appellant's statement, which Capt BA overheard, prove that Appellant touched LW's buttock with his hand. The fact that Appellant decided to grab a part of LW's body – her buttock – that is considered a private area to "gauge"

her romantic interest shows that he did so to gratify his sexual desires. Additionally, even after LW pushed him away and told him "That's enough," he went back for a second hug and nuzzled her neck. If he was only interested in finding out if LW shared his interest, he could have used his words and simply asked. The government has proved the first element.

Looking at the second element, the government proved that Appellant touched LW without her consent. The term "consent" means "a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7). In her sworn testimony, LW stated that as soon as Appellant grabbed her buttock, she pushed him off with both hands and said, "that's enough." (R. at 668.) At no point did LW consent to Appellant touching her buttock or indicate to him that it would be welcome if he did so. LW testified that Appellant was fifteen years older than she was, and she never viewed their hang outs as a romantic thing. (R. at 657-58.) Nothing in evidence demonstrated that Appellant would have had a reasonable belief that LW consented to being groped by Appellant. It is not reasonable to grab the buttocks of someone who has expressed no romantic interest in you. The government proved the second element of the offense.

2. The evidence demonstrated that Appellant's misconduct was unbecoming of an officer and a gentleman.

The government presented evidence beyond a reasonable doubt to show that Appellant committed conduct which was unbecoming of an officer and gentleman. To prove Appellant committed this offense, the government needed to prove that (1) the accused did or omitted to do certain acts, and (2) That, under the circumstances, the act or omission constituted conduct unbecoming an officer and gentleman. MCM, pt. IV, ¶ 90.c.2. The government did so through eyewitness testimony and Appellant's own statements.

Looking at the first element, the government proved that Appellant did certain acts. SM provided sworn testimony that she was married, and Appellant was her supervisor, when he made unwanted and inappropriate comments to her at work. (R. at 790, 794.) Specifically, she testified that he told her "I love you" and that she was "the type of girl I usually go after." (R. at 803-804.) SM immediately reported Appellant's statements to her co-workers and husband. (R. at 808, 824, 826, 830.)

Looking at the second element, the government proved that Appellant's conduct unbecoming an officer and gentleman. Conduct that violates this article includes,

> action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman . . . There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman.

MCM, pt. IV, ¶90.c.2.

The government proved the second element beyond a reasonable doubt through SM's testimony and Appellant's own words. SM was Appellant's subordinate, and they worked closely together because she was the only technician in Internal Medicine. Yet, in the same breath that he gave her a professional order – to handle anything that came up while he was in a meeting – he was told her "I love you" and objectified her by implying he was attracted to her. (R. at 803.) It is disgracing and indicative of indecorum that Appellant, who knew SW was married and his subordinate, chose to make inappropriate comments to her. Appellant's comments made SM very uncomfortable, especially because she knew she would "have to deal

with [him] every day single day [she] came into work." (R. at 833.) And Appellant knew that his conduct fell below the moral attributes we require from officers. Even as he made the comment, he said "I know there is a line here . . . and I know not to cross it." (R. at 803-804.) He then reiterated this sentiment when he came back from his meeting and acknowledged that his comment was inappropriate enough that SM still would not look at him. (R. at 827.) The government proved the second element of the offense.

B. Appellant failed to trigger factual sufficiency review because he did not demonstrate a specific deficiency in proof.

Appellant failed to demonstrate a specific deficiency in proof because witness testimony and Appellant's own statements supported each element of the offenses. Factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof."[4] 10 U.S.C. § 866(d)(1)(B)(i); Harvey, 2024 CAAF LEXIS 502 at *5. As amended, Article 66(d)(1)(B)(i) "eliminat[ed] a CCA's duty, ***and power***, to review a conviction for factual sufficiency absent an appellant" meeting both triggers. Id. (internal citations omitted) (emphasis added). Appellant asserted factual sufficiency as an assignment of error, (App. Br. at 9), but a deficiency of proof does not exist.

In his brief for Charge II, Appellant only generally argues that abusive sexual contact did not occur because he either mistakenly believed he had consent, or he did not grab LW's buttock with the intent to gratify his sexual desires. (App. Br. at 11-12.) And, for Charge III, he

[4] The issue of "the meaning of the phrase 'specific showing of a deficiency in proof'" was before our superior court in United States v. Harvey. Harvey, 2024 CAAF LEXIS 502, *6. However, because both parties agreed the Appellant had met his burden to make a specific showing of a deficiency of proof in that case, it was not addressed. Id. Recently, in United States v. Serjak, this Court handled an issue regarding legal and factual sufficiency. No. ACM 40392, 2024 CCA LEXIS 524, *44 (A.F. Ct. Crim. App. Dec. 11, 2024) (unpub. op.). There, this Court, "assume[d], without deciding, Appellant's claim of deficiency [was] sufficiently specific" for its analysis. Id.

generally argues his conduct did not rise to the level of violating Article 133, UCMJ. (App. Br. at 13.) Because Appellant did not meet both threshold elements for review by demonstrating a *specific* deficiency in proof, this Court lacks the power to perform a factual sufficiency review.

C. Even if this Court decides Appellant met both threshold elements to trigger factual sufficiency review, the weight of the evidence supports the conviction.

The weight of the evidence supports Appellant's conviction for abusive sexual contact and conduct unbecoming an officer and a gentleman. If this Court decides that both threshold triggers for factual sufficiency review are met for both charges, then this Court may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii).

To be "clearly convinced," this Court must meet two requirements: (1) "the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt;" and (2) this Court "must be clearly convinced of the correctness of this decision." Harvey, 2024 CAAF LEXIS 502 at *12.

1. Charge II and its Specification – Abusive Sexual Contact.

For Charge II, Appellant relies heavily on a defense of mistaken fact as to consent and, if that fails, he then argues that he did not touch LW's buttock to gratify his own sexual desires. (App. Br. at 11-12.) For his defense, Appellant suggests that he mistakenly believed he had consent to touch LW's buttock because at one point in the night he directed crude jokes[5] at LW, and LW

[5] Appellant also references a joke he made in a group message as evidence to support of his mistake of fact defense. (App. Br. at 11.) However, Appellant wrongly argues his joke was directed at LW – it was not. A lieutenant and her husband were also invited to the dinner at Appellant's home, but they had not returned anyone's phone calls or messages. (R. at 662.) In a group message, Appellant wrote, to a *lieutenant*, "Where are you? Are you doing pre-labor activities?" (R. at 663.) (emphasis added.) When LW, who was with Appellant when he sent the message, read that out loud, he simulated "humping the air." (Id.)

did not tell him to stop. (App. Br. at 11.) He also points out that it was "customary to hug to say goodbye." (Id.) This argument is lacking.

Listening to an individual's inappropriate jokes while at their house could be considered polite or a way to avoid a confrontation. But in no scenario, is it reasonable to assume that failing to call a person on their bad behavior provides consent for the individual to then grab the person's buttock. Nor is it reasonable to assume that because Appellant and LW have shared chaste, goodbye hugs in the past that he would have consent to go further and grope LW. It is also important to look at Appellant's own statement after LW pushed him away. He stated, "I just had to try." If Appellant truly believed he had LW's consent to grab her buttock, he would not have had to test out a theory to see if LW reciprocated his feelings – in his mind he would have already thought she did.

Appellant also argues, even if he did not have consent, he did not grab LW's buttock with the intent to gratify his own sexual desires. (App. Br. at 12.) Appellant attempts to categorize his groping as a "meager attempt" to "try to see if LW was interested in him." (Id.) Appellant's own argument demonstrates he did this with an intent to gratify his own sexual desires. He grabbed LW's buttock – not her arm, shoulder, or hand – to see if she was also romantically, sexually interested in him as he was in her.

When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing LW testify and demonstrate how Appellant grabbed her buttock, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt.

2. Charge III and its Specification – Conduct Unbecoming an Officer and Gentleman.

For Charge III, Appellant does not deny his conduct and agrees it was in error but argues that his conduct does not rise to the level of unbecoming an officer and a gentleman. (App. Br. at 12.) While Appellant does concede in his brief that he was SM's supervisor and in a "working relationship" with her, he fails to recognize the gravity that relationship had on his misconduct – the panel members did not. (Id. at 13.) Our superior court has explained "the 'gravamen of [Article 133, UCMJ] is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command . . . so as to successfully complete the military mission.'" United States v. Voorhees, 79 M.J. 5, 17 (C.A.A.F. 2019) (quoting United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009)). Appellant's comments to a subordinate who worked closely and directly with him, squarely fits into the category of conduct Article 133, UCMJ, criminalizes. In this case, the mission was directly affected because SM, who was the only technician in Internal Medicine, was required to be moved to another clinic as a direct result of Appellant's conduct. (R. at 797, 834.)

The members were convinced by the weight of credible evidence, that when Appellant told SM, a married woman and his subordinate, that she was "the type of girl" he would "usually go after" his conduct was indecorous or "conflicting with accepted standards of good conduct or good taste." Indecorous, MERRIAM WEBSTER'S DICTIONARY (2024 online ed.). Additionally, Appellant's own statements support this. Not only did he recognize that his conduct was "cringe" and crossing a line when he made the comments, but he later acknowledged to SM that he had done something so wrong that SM would not even look at him. (R. at 827.) This is consciousness of his own guilt.

The weight of the evidence supports Appellant's conviction for abusive sexual contact and conduct unbecoming an officer and gentleman. This Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

The same holds true for his legal sufficiency claim. The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted.) This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted.) Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted.)

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

Here, the record shows the charges and specifications are legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In

drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

II.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ.

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgement (EOJ) in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*STR* and *EOJ*, 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 and 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 asserts that his convictions did not trigger the firearm prohibition under 18 U.S.C. § 922 and the Staff Judge Advocate's determination was erroneous. (App. Br. at 16-17.) He also argues that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, citing to the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). (Id. at 14-15.) This Court recently held in its published

opinion in United States v. Vanzant, No. ACM 22004, 2024 CCA LEXIS 215, __ M.J. __ (A.F. Ct. Crim. App. 28 May 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at *24. Appellant suggests that Vanzant is not dispositive of his request because he has framed the issue merely as an error in post-trial processing under Article 66(d)(2), UCMJ, which he claims this Court did not analyze in Vanzant. 84 M.J. 671, 2024 CCA LEXIS 215, at *23. (App. Br. at 17-18.)

First, the Vanzant opinion was clear as to the scope of its jurisdiction under Article 66, UCMJ, and none of the cases cited by Appellant support his position that this Court has the authority to amend post-trial documents beyond correcting clerical errors related to the findings or sentence. *See*, e.g., United States v. Jones, No. ACM S32717, 2022 CCA LEXIS 652, at *4 (A.F. Ct. Crim. App. 7 Nov. 2022); United States v. Graves, No. ACM 40340, 2023 CCA LEXIS 356, at *8-9 (A.F. Ct. Crim. App. 23 Aug. 2023). (App. Br. at 17-18.)

Next, Appellant is not entitled to relief under Article 66(d)(2), UCMJ. A CCA "***may*** provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial ***after*** the judgment was entered into the record under section 860c of this title[.]" (emphasis added).

The 18 U.S.C. § 922 annotation was entered into the record before the EOJ was entered into the record. The 18 U.S.C. § 922 annotation on the First Indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are entered into the record. 10 U.S.C. § 8Article 60(1)(C). Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in Article 66(d)(2).

Compare Article 66 *with* Article 60c. Because the STR and the First Indorsement are entered into the record before the EOJ is entered into the record under Article 60c, the § 922 annotation on the STR's First Indorsement is not an error occurring "*after* the judgment was entered into the record." Article 66(d)(2) (emphasis added).

Then the STR and its First Indorsement are entered into the record again as attachments to the EOJ. Article 60c (a)(1)(A). Because they are entered again as attachments to the EOJ they are simultaneous with the judgment of the court. The STR and the STR's First Indorsement are not errors occurring after the judgment was entered into the record.

Appellant suggests that this Court could correct the First Indorsement to the EOJ because it is attached to the EOJ after the military judge signs it. (App. Br. at 17.); DAFI 51-201, para. 20.41. ("After the EoJ is signed by the military judge and returned to the servicing legal office, the SJA signs and attaches to the EoJ a first indorsement.") But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Even if this Court had authority to remove the firearms prohibition annotation from the First Indorsement to EOJ (*Entry of Judgment*, ROT Vol. 1 at 3), it could not remove the firearms annotation from the STR that was incorporated into the EOJ (*Entry of Judgment*, ROT, Vol. 1, Attach. at 3) because that annotation on the STR occurred before the EOJ was entered into the record. Thus, Appellant would remain in the same situation he is in now – having a firearms prohibition annotated on the EOJ. Since this Court's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should deny Appellant's claim.

III.[6]

THE UNITED STATES DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Notably, the Supreme Court recently denied certiorari in Anderson. *See* Order List, 601 U.S. __ (Feb. 20, 2024) (available at https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf); *see* also United States v. Cunningham, 83 M.J. 867 (C.A.A.F. 2023), Supreme Court certiorari denied by Cunningham v. United States, 2024 U.S. LEXIS 1430 (U.S., Mar. 25, 2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict, and Appellant's claim must fail.

[6] Issues III and IV are raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

IV.

THERE WAS NO UNLAWFUL COMMAND INFLUENCE IN THIS CASE.

Additional Facts

On 7 March 2022, Colonel Cory Baker, Commander of 48 MDG at RAF Lakenheath, preferred charges against Appellant to a general court-martial. (*Charge Sheet*, ROT, Vol. 1.) Charges were then referred by the Third Air Force Staff Judge Advocate on behalf of the Third Air Force commander. (Id.)

On 6 January 2023, Appellant's trial defense counsel interviewed now retired-Col DD, who was Appellant's squadron commander at the time. (Appellant's Mot. to Attach, Appendix C.) During that pre-trial interview, trial defense counsel asked Col DD what his preference would be regarding the resolution of Appellant's case. (Id.) Col DD explained he had wanted to issue a Letter of Reprimand (LOR) but the legal office's recommendation was for a general court-martial. (Id.) Specifically, he explained the legal office recommendation was to proceed to a general court-martial and, when he "non-concurred," the case was pulled up to the group commander who preferred charges. (Id.)

During Appellant's trial, Col DD testified as a witness. (R. at 742-60.) Yet, Appellant never raised the issue of unlawful command influence or defective preferral. (R. at 4.)

Following Appellant's conviction, on 13 February 2024, a Board of Inquiry (BOI) was convened. (Appellant's Mot. to Attach, Appendix D.) During the BOI, Col DD testified on Appellant's behalf. (Id. at Appendix A.) During his testimony, Col DD again reiterated that in his "opinion" an LOR was appropriate. (Id. at 4.) But after the group commander's "consultation" with the legal office, the group commander went with the legal office's "recommendation," pulled the case up to his level, and preferred charges. (Id. 4-6.)

Standard of Review

This Court reviews allegations of unlawful command influence (UCI) de novo. United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013). Similarly, this Court reviews whether an Appellant has waived an issue de novo. United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law

Article 37, UCMJ, prohibits unlawful command influence (UCI). Prior to 20 December 2019, there were two types of unlawful command influence in the military justice system: "*actual* unlawful command influence and *the appearance of* unlawful command influence." United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017) (emphasis in original). Actual UCI occurs when there "is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." Id. (citations omitted). In order to demonstrate actual UCI, an appellant "must show: (1) facts, which if true, constitute [UCI]; (2) that the proceedings were unfair; and (3) that the [UCI] was the cause of the unfairness." Salyer, 72 M.J. at 423 (citation omitted).

"[T]he initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation." Id. (citation omitted). The Appellant must show "some evidence" that UCI occurred. Boyce, 76 M.J. at 249. The second and third factors require the appellant to demonstrate that he suffered prejudice as a result of the UCI. *See* Id. at 248. If an appellant meets his initial burden, the burden shifts to the Government to prove beyond a reasonable doubt that "(1) the predicate facts do not exist; (2) the facts do not constitute [UCI]; or (3) the [UCI] did not affect the findings or sentence." Id. (citation omitted).

Pre-20 December 2019, the second type of UCI was an appearance of UCI. Unlike actual UCI, a claim of an appearance of UCI does not require prejudice to the appellant; rather, the prejudice is the adverse impact to the "public's perception of the fairness of the military justice system as a whole." Id. at 248-49. In order to demonstrate the appearance of UCI, an appellant must show "some evidence" of UCI. Id. at 249. Should an appellant meet this burden, the Government must then prove beyond a reasonable doubt that the predicate facts do not exist, the facts do not constitute UCI, or that the UCI "did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding." Id. (internal quotation marks, alterations, and citations omitted).

In 2020, Congress significantly amended Article 37, UCMJ. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532 (2019). The amendments to Article 37, UCMJ, went into effect on 20 December 2019. Id. In its current form, Article 37, UCMJ, now provides that "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." Article 37(c), UCMJ. This Court has held, consistent with its sister service courts, that under the amended, current version of Article 37, UCMJ, apparent UCI is no longer a viable theory because appellants are "required to demonstrate material prejudice in order to obtain relief." United States v. Burnett, No. ACM 39999, 2022 CCA LEXIS 342, at *58 (A.F. Ct. Crim. App. 10 June 2022).

In United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994), our superior Court discussed the advice of SJA and when it may constitute UCI as follows:

> Even though an SJA is neither a commander nor a convening authority, we have held that actions by an SJA may constitute

> unlawful command influence, because "a staff judge advocate generally acts with the mantle of command authority." United States v. Kitts, 23 M.J. 105, 108 (CMA 1986). We do not believe, however, that every instance of advice or expression of opinion by an SJA is attributed to his or her commander. We also do not believe that SJAs must be timid in expressing their views. SJAs frequently are asked for legal advice by subordinate commanders, and they are obliged to provide competent and candid advice. It is incumbent upon SJAs, however, to make it clear when they are expressing the view of their commanders and when they are expressing their own legal opinions.

Hamilton, 41 M.J. at 37.

Further, any "objections asserting a defect in the preferral of charges based upon unlawful command influence need[] to be raised prior to entry of pleas." United States v. Givens, 82 M.J. 211, 216 (C.A.A.F. 2022). "Defects in preferring and forwarding charges are waived if not raised at trial, unless the failure to raise the issue is itself the result of unlawful command influence." United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999) (citing Hamilton, 41 M.J. at 37).

Analysis

By failing to raise alleged UCI in preferral, Appellant has waived this issue. Even if Appellant did not waive a claim of UCI during preferral, his claims of UCI in this case are unsupported by the record. As detailed above, when Appellant's squadron commander was uninterested in pursuing charges, his group commander consulted with the legal office and, based on the legal office's recommendation, the group commander pulled the case up to his level and preferred charges.

A. Appellant waived the issue of UCI during the accusatory phase when he failed to raise it prior to the entry of his pleas.

Appellant has waived this issue. Appellant's trial defense counsel claimed in his recent affidavit to this Court that he interviewed Appellant's squadron commander *prior* to his court-

martial as a part of pretrial interviews. (Appellant's Mot. to Attach, Appendix C.) (emphasis added.) It was during this interview, that Appellant first learned that his squadron commander would have preferred to issue an LOR for Appellant's misconduct and when he "non-concurred" with the legal office's recommendation, the case was pulled up to the group commander for preferral. (Id.) Yet, Appellant, who argues in his appeal that this constituted UCI, did not raise the issue of defective preferral due to UCI at his trial. (R. at 4.) Appellant filed four (4) motions none of which pertained to this issue. (Id.)

Since Appellant failed to raise his claim of defective preferral due to UCI prior to trial and does not claim he was prevented from objecting to an alleged coerced preferral, he has waived this issue and is not entitled to relief. Richter, 51 M.J. at 224.

B. Appellant's actual UCI claim fails because Appellant failed to meet his initial burden of demonstrating "some evidence" of actual UCI.

Even if this Court determines that Appellant did not waive the issue, Appellant cannot meet his burden to prove that there was UCI. To meet his burden, Appellant must show "some evidence" that UCI occurred. Boyce, 76 M.J. at 249. And "[w]hile 'the threshold for triggering an [unlawful command influence] inquiry is low . . . it must be more than a bare allegation or mere speculation.'" United Stated v. Argo, 46 M.J. 454, 461 (C.A.A.F. 1997) quoting United States v. Johnston, 39 M.J. 242, 244 (CMA 1994). Appellant has not done this.

Appellant's sole claim that UCI occurred, is that his squadron commander wanted to issue an LOR and then the legal office "went over his head" and consulted with his group commander who then pulled the case up to his level. (App. Br. at 5.) These circumstances do not demonstrate UCI.

Appellant has not offered any evidence to demonstrate that the group commander was improperly influenced by the legal office or did not make an independent decision to prefer

charges against Appellant. Simply put, the group commander was not bound by the squadron commander's opinion that Appellant should be issued an LOR. Per R.C.M. 306(a) "each commander had discretion to dispose of offenses by members of that command." As the superior commander, it was within the group commander's purview to make an independent decision to bring Appellant's case to his level and prefer charges – which he did. Had a different set of facts occurred – for instance, if Col DD was pressured into preferring charges by the legal office or his superior commander despite his preference to issue an LOR – then perhaps Appellant would succeed in demonstrating that UCI occurred. However, those are not the facts of this case since no one influenced Col DD to take any action. Nor has Appellant offered any evidence that his group commander was influenced into preferring charges. Therefore, Appellant's actual UCI claim fails.

C. Appellant's apparent UCI claim fails because apparent UCI is no longer a viable theory of relief and, in any event, an objective, disinterested observer would not harbor a significant doubt about the fairness of this Court's review of Appellant's claims.

Appellant's apparent UCI theory – that the legal office's actions amounted to "vindictive prosecution" and placed an "intolerable strain on the public's perception of the military justice system"– also fails. (App. Br. at 6.) For one, under the current version of Article 37, UCMJ, apparent UCI is not a viable theory of relief. Burnett, unpub. op. at *58. Yet, even if it is still a viable theory, Appellant's claim still fails because an objective, disinterested observer fully informed of all the facts and circumstances would not harbor a significant doubt about the fairness of the proceedings. Col DD was never pressured into preferring charges. Instead, a neutral, higher-ranking officer reviewed the evidence and, upon advice of legal counsel, found determined that a court-martial was the appropriate course of action.

Appellant has failed to demonstrate why he is entitled to relief under either an actual or apparent UCI theo1y. Therefore, Appellant is entitled to no relief.

CONCLUSION

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

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Militaiy Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 Febrna1y 2025.

B ffl RS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Militaiy Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**REPLY BRIEF ON BEHALF**
Appellee	)	**OF APPELLANT**
	)	
v.	)	Before Special Panel
	)	
Major (O-4)	)	No. ACM 40507
JORGE A. ARIZPE	)	
United States Air Force	)	19 February 2025
Appellant	)	

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

COMES NOW, Appellant, Major (Maj) Jorge A. Arizpe, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this Reply Brief to the Government's Answer, filed 12 February 2025 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in his Brief on Behalf of Appellant, filed on 14 January 2025 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

Argument

I. Even assuming the buttock touch occurred as LW testified, the Government did not prove that Maj Arizpe had the intent to gratify his sexual desire, nor that Maj Arizpe did not have a mistake of fact as to consent.

The only evidence the Government presented at trial that it argued showed Maj Arizpe's sexual intent was the comment, "You know I just had to try." R. at 668. As context, LW testified that she had her phone in her right back pocket and that Maj Arizpe used his left hand to touch her clothed right buttock cheek. R. at 668, 675. This allegedly occurred during a consensual hug, which was ordinary for them to do when saying goodbye after spending time together. R. at 667, 704. Afterward, Maj Arizpe and LW hugged a second time. R. at 668. LW testified that she "froze"—she did not push him off or say anything about not wanting the hug. *Id.* As explained

in his opening brief, one specific deficiency in proof concerned the mens rea that Maj Arizpe had at the time. App. Br. at 11-12. The Government argues that Maj Arizpe had the intent to gratify his sexual desire when he touched the clothing above a cellphone in the right back pocket of LW's jeans. Merely touching someone's buttock, without satisfaction of the intent element, is not sufficient proof for abusive sexual contact under Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. The Government had to also prove the required mens rea and it failed to do so. Arguing a "romantic interest shows that he did so to gratify his sexual desire" is not sufficient proof of mens rea. Gov. Ans. at 8. The Government seems to assume without proof that a romantic interest automatically equates to sexual desire. "The [G]overnment's duty to prove that the defendant it seeks to convict had a culpable state of mind when committing a proscribed act is as ancient as it is fundamental to our system of justice." *Diaz v. United States*, 602 U.S. 526, 543-44 (2024) (Gorsuch, J., dissenting). Requiring proof of a culpable state of mind is imperative as "[c]riminal liability imports a condemnation" of the gravest kind. *Id.* at 544. Saying "You know I just had to try" does not equal an intent to gratify his sexual desire. And while "[i]f he was only interested in finding out if LW shared his interest, he could have used his words and just asked," as the Government argues, that still does not equate to the specific intent of touching to gratify his sexual desire. Gov. Ans. at 8.

In a factually similar case, *United States v. Rice*, No. ACM 39071, 2017 CCA LEXIS 745 (A.F. Ct. Crim. App. Nov. 21, 2017), the appellant was not convicted of the charged offense of abusive sexual contact for "grabbing [the named victim 1's] buttocks," but instead convicted of the lesser included offense—assault consummated by a battery.[1] *Rice*, 2017 CCA LEXIS 745, at

[1] The Court of Appeals for the Armed Forces (CAAF) granted on an issue regarding the military judge's instruction in violation of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), and the

*18. In the instant case, the Government in arguendo may have been able to prove that kind of offense—Article 128, UCMJ, 10 U.S.C. § 928—but that would not have risen to the seriousness of a General Court-Martial nor would it have resulted in sex offender registration.[2] Instead, the Government charged abusive sexual contact, so it is required to prove the specific intent to gratify Maj Arizpe's sexual desire. Charge Sheet.

Distinguishable from this case is *United States v. Johnson*, No. ACM 40257, 2023 CCA LEXIS 330 (A.F. Ct. Crim. App. Aug. 9, 2023), wherein this Court held the evidence for abusive sexual contact was legally and factually sufficient. There, in September 2020, the appellant put his hand down the named victim's pants and underwear, was touching her vaginal area with his fingers, and touched the named victim's buttocks; the victim felt warmth and pressure on her buttocks, torso and upper thigh from the appellant's penis. *Johnson*, 2023 CCA LEXIS 330, at *6-7. When the named victim got up and told the appellant to leave, she noticed he had an erection. *Id.* at *8. The Government's evidence to show the appellant's intent included his comment to the named victim seven months earlier that he thought she was "hot and nice to look at" and additional evidence. *Id.* at *3. However, there was much more than mere words in *Johnson* establishing the specific intent to gratify the appellant's sexual desire. Not only did the named victim testify that the appellant touched her under her clothes, but she also testified he touched her in her vaginal

---

Court of Criminal Appeals' (CCA) holding the error was harmless beyond a reasonable doubt. *United States v. Rice*, 77 M.J. 365 (C.A.A.F. 2018) (mem.). The Court of Appeals for the Armed Forces summarily reversed the findings of guilty as to the three affected specifications. *Id.* The Government at trial proved intent to gratify sexual desire in other charges by using evidence of the other abusive sexual assault allegations also charged. *Rice*, 2017 CCA LEXIS 745, at *24-26 ("there was ample evidence to support a conclusion that Appellant formed the intent to gratify his sexual desire. The members were presented with evidence that Appellant touched [named victim 2's] buttocks, returned 15 minutes later to touch [named victim 2's] thigh, touched [named victim 1's] buttocks in the process of lifting up her dress, and later touched [named victim 3's] breast.").

[2] *See* Col DD's position that a Letter of Reprimand (LOR) was more appropriate. Issue IV in App. Br., Appendix at 3-9; EOJ.

area as well. *Id.* at *6-8. The named victim not only felt his penis pressed against her, but she also saw it was erect when she got up. *Id.* What's more, the members heard the appellant tell the Air Force Office of Special Investigations (AFOSI) that he did in fact squeeze her and was rubbing the named victim's buttocks. *Id.* at *23.

None of those facts exist in Maj Arizpe's case. Maj Arizpe did not touch LW under the clothes, he did not touch her vaginal area, he did not rub his penis against her buttock, torso and upper thigh, nor at any point was there physical evidence demonstrating arousal, such as an erection, that would indicate specific intent. Potentially having a romantic interest does not equal sexual desire and arousal just as being in a relationship with someone does not automatically equal a sexual relationship. *United States v. Alston*, 75 M.J. 875 (A. Ct. Crim. App. 2016) ("The existence of a romantic relationship is not 'sexual behavior' or 'predisposition' . . . ."). Further, the Government did not prove that Maj Arizpe's voluntary intoxication[3] did not negate the specific intent required for the members to find him guilty of sexual abusive contact.

Maj Arizpe had a reasonable mistake of fact as to consent that LW consented to his expression of interest to see if she was interested. The night in question was similar to dinner parties both Maj Arizpe and LW attended on multiple occasions. R. at 655-56. All guests at the dinner party made crude jokes throughout the evening and Maj Arizpe and LW even hugged to say goodbye. R. at 662-63, 704, 733-35. Specific to the interactions between LW and Maj Arizpe that night, Maj Arizpe mimed a hip-thrusting action while looking at LW after a text about "pre-labor activities" was read. R. at 663. LW responded that she of course knew what kind of "pre-labor activities" he was referring to. *Id.* LW then continued to stay after one person left the dinner.

[3] The military judge instructed the members on voluntary intoxication as it related to the abusive sexual contact offense which required proof of the intent to gratify the sexual desire of Maj Arizpe. R. at 936.

R. at 733-35. She did not say she was uncomfortable or directly tell Maj Arizpe to stop. Instead, she made eye contact with BS and they decided to leave. R. at 726, 728. LW never told Maj Arizpe she was uncomfortable with the crude jokes, many of which were directed at her. At no point was he made aware that LW was uncomfortable or did not want his attention until she pushed him away during the hug. R. at 668.

II. The finding of guilty to Charge III was not legally and factually sufficient as the subject speech was protected under the First Amendment.

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. "Issues of legal sufficiency and whether a statute is constitutional as applied are reviewed de novo." *United States v, Smith*, No. 23-0207, _M.J. _, 2024 CAAF LEXIS 759, at *1 (C.A.A.F. 2024). The Supreme Court of the United States (SCOTUS) stated in *Parker v. Levy* that "members of the military are not excluded from the protection granted by the First Amendment" but that a different application of those protections is required due to the military mission and character of the military community. 417 U.S. 733, 758 (1974). This general proposition remains true for military members.

In light of this, the Court of Appeals for the Armed Forces (CAAF) made clear what the three-step approach, the third-step being a balancing test, is for deciding free speech cases involving military members. *United States v. Grijalva*, 84 M.J. 433, 436 (C.A.A.F. 2024). The CAAF first asks two threshold questions prior to applying the balancing test to the charge: (1) is the speech involved protected under the First Amendment for civilians; and (2) if so, does the speech have a direct and palpable connection to the military mission or environment. *Id.* (citing *United States v. Wilcox*, 66 M.J. 442, 447-48 (C.A.A.F. 2008)). If the first threshold question is found in the negative and the speech is not protected, then the analysis ends—restricting or even criminalizing unprotected speech does not violate the First Amendment. *Smith*, 2024 CAAF

LEXIS 759, at *9-10. If the first threshold question is answered in the affirmative, this Court moves to the second threshold question. *Grijalva*, 84 M.J. at 436. If the second question is answered in the negative, the speech may not be criminalized as it is protected by the First Amendment as it pertains to civilians and with no direct and palpable connection to the military mission or environment, servicemembers' speech cannot be further restricted. *Id.* If the second question is answered in the affirmative, then this Court conducts a balancing test. *Wilcox*, 66 M.J. at 449.

As to the first question, categories of unprotected speech "include (1) incitement to imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech presenting some grave and imminent threat the Government has the power to prevent." *Smith*, 2024 CAAF LEXIS 759, at *10 (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)). None of these unprotected categories apply to Maj Arizpe's charged speech of "I love you" or "You are my type of girl I usually go after." Charge Sheet; EOJ. As such, the speech is protected under the First Amendment.

Since the first question was answered in the affirmative, this Court then moves to the second question. As to the second question, the CAAF in *Grijalva* re-affirmed that *Wilcox* requires the Government to prove a direct and palpable connection to the military mission or environment for First Amendment cases. 84 M.J. at 436 (citing *Wilcox*, 66 M.J. at 447-48). This is true even in close cases where speech may not be protected. *Grijalva*, 84 M.J. at 438 (interpreting *Wilcox*, 66 M.J. at 447). In *Wilcox*, the appellant identified himself as a servicemember multiple times both on his online profile and during several conversations with an undercover agent. 66 M.J. at 450, 445-46. The appellant identified himself as a "Pro-White activist" and stated, "[we] must

secure the existence of our people and a future for white children." *Id.* at 445 (alteration in original). The CAAF held the required direct and palpable connection to the military environment or mission was not met because the speech was not directed at servicemembers. *Id.* at 450. In two cases preceding *Wilcox*, *Priest* [4] and *Brown*, [5] the CAAF and its predecessor held that the appellants' speech was speech directed to servicemembers and therefore had a direct and palpable impact on the military mission. *Wilcox*, 66 M.J. at 450. The speech in *Priest* included the publishment of a newsletter calling for desertion from the military as well as a violent resolution against the United States during the Vietnam War. *Priest*, 45 C.M.R. at 342. The appellant's actions in *Brown* included the organization of a strike to promote better living conditions in a combat zone, which jeopardized the orderly accomplishment of the war fighting mission. *Brown*, 45 M.J. at 392-93, 395. Here, SM was a civilian dependent spouse who worked in the 58th Medical Group; she was not a servicemember. R. at 790. Maj Arizpe's speech did not in any way call for action directly related to service, such as the type at issue in *Priest* and *Brown*. The Government did not prove that Maj Arizpe's speech had a direct and palpable impact on the military mission. As such, the balancing test under *Wilcox* is mooted and a determination of whether criminalization for that speech is justified despite First Amendment concerns is not needed. *Wilcox*, 66 M.J. at 449.

[4] 45 C.M.R. 388 (C.M.A. 1972).
[5] 45 M.J. 389 (C.A.A.F. 1996).

WHEREFORE, Maj Arizpe respectfully requests that this Honorable Court set aside his convictions to Charges II and III and set aside his sentence.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 February 2025.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770