**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>31 July 2023 |

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **6 October 2023**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: frederick.johnson.11@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 July 2023.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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Email: frederick.johnson.11@us.af.mil

1 August 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

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

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

[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 1 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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United States Air Force
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>29 September 2023 |

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 November 2023**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 6 June 2022 and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his plea, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 September 2023.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Email: frederick.johnson.11@us.af.mil

3 October 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

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

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

[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 3 October 2023.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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(240) 612-4800

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>27 October 2023 |

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 December 2023**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 6 June 2022 and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his plea, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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Email: frederick.johnson.11@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 Government Trial and Appellate Operations Division on 27 October 2023.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: frederick.johnson.11@us.af.mil

30 October 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

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

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

[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 30 October 2023.

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**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>28 November 2023 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 January 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 6 June 2022 and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his plea, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 26 clients; 18 clients are pending initial AOEs before this Court.[1] Seven matters have priority over this case:

1) *United States v. Lake*, ACM 40168 – The record of trial is 17 volumes consisting of 101 prosecution exhibits, 14 defense exhibits, and 135 appellate exhibits; the transcript is 1418 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record and begun drafting the AOE in this case.
3) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel assisted in the preparation and sat second chair for oral argument in *U.S. v. Jennings*, ACM 40282, participated in practice oral arguments for five additional cases, began drafting the AOE in *U.S. v. Taylor*, ACM 40371, and petitioned the CAAF for review and prepared and filed the supplement to the petition in both *U.S. v. Gause-Radke*, ACM 40343, USCA No. 24-0028/AF, and *U.S. v. Gonzalez Hernandez*, ACM S32732, USCA No. 24-0030/AF. Additionally, counsel attended the Appellate Judges Education Institute Summit on 2–5 November 2023, was off for the Veterans Day holiday, and was on leave on 22–27 November 2023.

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

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

6) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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Office: (240) 612-4770
Email: frederick.johnson.11@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 Government Trial and Appellate Operations Division on 28 November 2023.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

29 November 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(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 29 November 2023.

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

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40476** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Ian J.B. CADAVONA** | ) | |
| **Airman Basic (E-1)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 28 December 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 4th day of January 2024,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **3 February 2024**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>28 December 2023 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 February 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 6 June 2022 and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his plea, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

[1] Since the filing of Appellant's last request for an enlargement of time, counsel petitioned the CAAF for review and prepared and filed the supplement to the petition in *U.S. v. Lake*, ACM 40168, USCA No. 24-0047/AF; prepared and filed the AOE in *U.S. v. Taylor*, ACM 40371; and participated in practice oral arguments for three additional cases. Additionally, counsel was on leave on 15 December 2023 and off for the Christmas holiday.

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

5) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@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 Government Trial and Appellate Operations Division on 28 December 2023.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

3 January 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

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

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

[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 3 January 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>26 January 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 March 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 6 June 2022 and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 30 clients; 21 clients are pending initial AOEs before this Court.[1] Six matters have priority over this case:

1) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has reviewed the record of trial and is drafting the AOE in this case.
2) *United States v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF – The record of trial is 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel has petitioned the CAAF for a grant of review and is preparing the supplement to the petition in this case.
3) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed the four-volume record and began drafting the AOE in *U.S. v. Myers*, ACM S32749; petitioned the Court of Appeals for the Armed Forces (CAAF) for a grant of review in *U.S. v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF; filed a nine-page motion in *U.S. v. Bartolome*, ACM 22045; and participated in practice oral arguments for two additional cases. Additionally, counsel was heavily involved in the preparations for the Judge Advocate General's Corps 75th Anniversary Event and was off for the New Year's and Birthday of Martin Luther King, Jr. holidays.

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

5) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 26 January 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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Email: frederick.johnson.11@us.af.mil

26 January 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

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

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

[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 26 January 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**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>23 February 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 April 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 29 clients; 19 clients are pending initial AOEs before this Court.[1] Five matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed approximately three-quarters of the record of trial in this case.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to present oral argument as lead counsel in this case on 21 March 2024.
3) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the AOE in *U.S. v. Myers*, ACM S32749; prepared and filed the supplement to the petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF; prepared and filed a reply to the Government's answer in *U.S. v. Taylor*, ACM 40371; prepared and filed a nine-page response to a government motion in *U.S. v. Bartolome*, ACM 22045; reviewed approximately three-quarters of the eight-volume record of trial in *U.S. v. Patterson*, ACM 40426; prepared and filed a citation to supplemental authority with the CAAF in *U.S. v. Driskill*, ACM 39889 (f rev), USCA Dkt. No. 23-0066/AF; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the Washington's Birthday holiday.

4) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 February 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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26 February 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time 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 300 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with out superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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.

[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 26 February 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**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>22 March 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 May 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 288 days have elapsed. On the date requested, 330 days will have elapsed.

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 18 clients are pending initial AOEs before this Court.[1] Three matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial and is drafting the AOE in this case.
2) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has begun reviewing the record of trial in this case.
3) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared for and presented oral argument to this Court as lead counsel in *U.S. v. Taylor*, ACM 40371; completed his review of the eight-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Patterson*, ACM 40426; prepared and filed a reply to the Government's answer in *U.S. v. Myers*, ACM S32749; began his review of the four volume record of trial in *U.S. v. Zhong*, ACM 40441; and participated in practice oral argument and preparation sessions for two additional cases. Additionally, counsel was on leave on 7–11 March 2024.

to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 March 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: frederick.johnson.11@us.af.mil

25 March 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time 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 330 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with out 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.

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 25 March 2024.

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

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40476** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Ian J.B. CADAVONA** | ) | |
| **Airman Basic (E-1)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 23 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

This court held a status conference on 29 April 2024 to discuss the progress of Appellant's case. Lieutenant Colonel Peter Ferrell represented the Government, and Major Frederick Johnson represented Appellant. Lieutenant Colonel Allen Abrams also attended as the Deputy Chief of the Appellate Defense Division. Appellant's counsel explained that this case is his third priority before this court. Appellant's counsel informed the court that he has begun his preliminary review of Appellant's case. He further represented that, if granted, there may be one or two additional requests for an enlargement of time in this case.

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 29th day of April 2024,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **2 June 2024**.

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

FOR THE COURT

[redacted]

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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J. B. CADAVONA,**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40476<br><br>23 April 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 June 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed.

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 26 clients; 17 clients are pending initial AOEs before this Court.[1] Three matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has drafted the AOE in this case.
2) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has reviewed approximately ninety percent of the record of trial in this case.
3) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a brief on a specified issue in *U.S. v. Taylor*, ACM 40371; finished drafting a 30-page AOE in *U.S. v. Patterson*, ACM 40426; reviewed approximately eighty percent of the four-volume record of trial in *U.S. v. Zhong*, ACM 40441; prepared and filed a motion to dismiss in *In re R.R.*, Misc. Dkt. No. 2024-02; and participated in practice oral arguments for two additional cases. Additionally, counsel was on leave on 29 March 2024.

to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 April 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: frederick.johnson.11@us.af.mil

24 April 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40476<br><br>Panel No. 1 |

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time 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 360 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with out superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet begun review of the record of trial at this late stage of the appellate process.

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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 24 April 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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United States Air Force
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1) **IAN J. B. CADAVONA,** United States Air Force, *Appellant.* | ) | No. ACM 40476 |
| | ) | 23 May 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 July 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 350 days have elapsed. On the date requested, 390 days will have elapsed.

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 19 clients are pending initial AOEs before this Court.[1] Two matters have priority over this case:

1) *United States v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF – The record of trial is two volumes consisting of three prosecution exhibits, one defense exhibit, and nine appellate exhibits; the transcript is 142 pages. Undersigned counsel has petitioned the CAAF for a grant of review in this case and drafted the supplement to the petition.
2) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately sixty percent of the record of trial in this case.

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

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[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 30-page AOE in *U.S. v. Patterson*, ACM 40426; completed his review of the four-volume record of trial and prepared and filed a 25-page AOE in *U.S. v. Zhong*, ACM 40441; prepared and filed a petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) and drafted the supplement to the petition in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; reviewed approximately sixty percent of the eight-volume record of trial in *U.S. v. Kershaw*, ACM 40455; and participated in a practice oral argument for one additional case. Additionally, counsel was out of town on temporary duty (TDY) on 25–26 April and 6–10 May 2024 and attended the CAAF continuing legal education program on 15 and 16 May 2024.

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 May 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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28 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br><br>ACM 40476<br><br>Panel No. 1 |

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over one year delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. 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 28 May 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 40476** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Ian J. B. CADAVONA** | ) | |
| **Airman Basic (E-1)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 6 June 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibit 5 and Prosecution Exhibit 7 which were reviewed by trial and defense counsel at Appellant's court-martial.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial, United States* (2024 ed.).

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

Accordingly, it is by the court on this 7th day of June 2024,

**ORDERED:**

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 5 and Prosecution Exhibit 7**, 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] EEFE, Capt, USAF
Acting Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| **UNITED STATES,** *Appellee*, | ) | **CONSENT MOTION TO EXAMINE SEALED MATERIALS** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1) **IAN J. B. CADAVONA,** United States Air Force, *Appellant*. | ) | No. ACM 40476 |
| | ) | 6 June 2024 |

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman Basic Ian J. B. Cadavona, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Prosecution Exhibits 5 and 7 in Appellant's record of trial.

**Facts**

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. In the course of the proceedings, the court admitted into evidence two exhibits, Prosecution Exhibits 5 and 7, which the military judge ordered sealed. R. at 89, 122, 329.

**Law**

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a

colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation," perform "reasonable diligence," and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b) (11 December 2018). These requirements are consistent with those imposed by the state bar to which counsel belongs.[1]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by The Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

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

**Analysis**

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

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

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 June 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1) **IAN J. B. CADAVONA,** United States Air Force, *Appellant.* | ) | No. ACM 40476 |
| | ) | 21 June 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 August 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 379 days have elapsed. On the date requested, 420 days will have elapsed.

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 16 clients are pending initial AOEs before this Court.[1] Two matters have priority over this case:

1) *United States v. Doroteo*, ACM 40363 – The record of trial is 14 volumes consisting of 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits; the transcript is 2,149 pages. Undersigned counsel was recently detailed to this case and is assisting with drafting a supplemental filing based on new post-trial disclosures.
2) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately ninety five percent of the record of trial and begun drafting the AOE in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 13-page reply to the Government's answer in *U.S. v. Patterson*, ACM 40426; prepared and filed the supplement to the petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; reviewed approximately thirty five percent of the eight-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Kershaw*, ACM 40455; sat as second chair for oral argument before this Court and assisted with drafting a supplemental filing based on new post-trial disclosures in *U.S. v. Doroteo*, ACM 40363; reviewed 382 pages of a verbatim transcript requiring certification; and participated in practice oral arguments for one additional case. Additionally, counsel was off for the Memorial Day and Juneteenth holidays and was on leave on 13–15 June 2024.

informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 June 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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25 June 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br><br>ACM 40476<br><br>Panel No. 1 |

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over a year delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 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.

[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 25 June 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,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)** |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1) **IAN J. B. CADAVONA,** United States Air Force, *Appellant.* | ) | No. ACM 40476 |
| | ) | 25 July 2024 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a twelfth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 12 days, which will end on **13 August 2024**. The record of trial was docketed with this Court on 8 June 2023. From the date of docketing to the present date, 413 days have elapsed. On the date requested, 432 days will have elapsed.

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 263; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 6 December 2022. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *U.S. v. Airman Basic Ian J.B. Cadavona*, 353d Special Operations Support Squadron, Kadena Air Base, Japan, undated (signature dated 17 November 2022).

The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Appellant is not currently confined. Undersigned counsel has reviewed the record of trial in this case and begun drafting the AOE.

Counsel is currently representing 24 clients; 14 clients are pending initial AOEs before this Court.[1] This case is currently counsel's highest priority amongst cases pending initial AOEs before this Court.

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

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

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial and prepared and filed a 45-page AOE in *U.S. v. Kershaw*, ACM 40455; filed a 29-page supplemental brief, a 27-page reply to the government's answer, and an additional 12-page motion for leave to file a supplemental brief and supplemental brief in *U.S. v. Doroteo*, ACM 40363; completed his review of the four-volume record of trial, including sealed materials, and began drafting the AOE in this case; reviewed 857 pages of a verbatim transcript requiring certification; and participated in a practice oral argument for one additional case. Additionally, counsel was off for the Independence Day holiday.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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**CERTIFICATE OF FILING AND SERVICE**

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: frederick.johnson.11@us.af.mil

26 July 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman Basic (E-1)<br>IAN J.B. CADAVONA, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br><br>ACM 40476<br><br>Panel No. 1 |

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 432 days in length. Appellant's over a year delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 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.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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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 26 July 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| **UNITED STATES,**<br><br>*Appellee*,<br>v.<br><br>Airman Basic (E-1)<br>**IAN J.B. CADAVONA,**<br>United States Air Force,<br><br>*Appellant*. | **BRIEF ON BEHALF OF APPELLANT**<br><br>Before Panel No. 1<br><br>No. ACM 40476<br><br>13 August 2024 |

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

**Assignments of Error**

**I.**

**WHETHER THE GOVERNMENT'S SUBSEQUENT PROSECUTION OF AN OFFENSE KNOWN BEFORE A PREVIOUS COURT-MARTIAL CONSTITUTES PLAIN ERROR.**

**II.**

**WHETHER AIRMAN BASIC CADAVONA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL WITHDREW THE OBJECTION TO A MAJOR CHANGE TO THE SPECIFICATION, MAKING IT EASIER FOR THE GOVERNMENT TO MEET ITS BURDEN OF PROOF.**

**III.**

**WHETHER A 224-DAY POST-TRIAL PROCESSING PERIOD WITHOUT A DISCERNABLE EXPLANATION WARRANTS RELIEF.**

**IV.**

**WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO AIRMAN BASIC CADAVONA BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" [1] WHEN AIRMAN BASIC CADAVONA WAS CONVICTED OF A NON-VIOLENT**

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

**OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION.**

## Statement of the Case

On 6 June and 25–27 October 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, found Appellant, Airman Basic (AB) Ian Cadavona, guilty, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ),[2] 10 U.S.C. § 934. R. at 263. The military judge sentenced Appellant to be reprimanded, confined for 21 months, and dishonorably discharged from the service. R. at 329. The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action (CADA), undated (signature dated 17 November 2022).

## Statement of Facts

The government initially investigated AB Cadavona for indecent recording and indecent broadcasting in late 2019 and early 2020. R. at 49, 55; Pros Ex. 12. Investigators obtained a warrant to search an iCloud account believed to be associated with AB Cadavona. R. at 49. A review of the return from this warrant revealed suspected child pornography, leading investigators to obtain an expanded warrant. *Id.* A review pursuant to the expanded warrant revealed multiple files believed to contain child pornography, as listed in a report dated 8 September 2020. R. at 50; App. Ex. VII at 11–22.

The government proceeded to prosecute AB Cadavona, and he was convicted of indecent recording, indecent broadcasting, and obstructing justice in March 2021. Pros. Ex. 12. AB

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

Cadavona served his sentence, including seven months of confinement, and was released. *Id.*; R. at 317. After his release, the government preferred the charge at issue here on 16 February 2022. DD Form 458, *Charge Sheet*. AB Cadavona was arraigned in June 2022, and this case ultimately went to trial in October 2022. R. at 1, 20.

According to evidence introduced at his second trial, the warrant return for the iCloud account contained a backup file from an iPhone 6s. R. at 85. This backup file contained a folder for a file storage application called MEGA. R. at 91. The MEGA folder and its subfolders, including one subfolder named "forbidden long teen videos," contained approximately 70 files. R. at 114–15. The files from the MEGA application were admitted as Prosecution Exhibit 5, while other files from elsewhere in the iPhone backup file were admitted as Prosecution Exhibit 7. R. at 88–89, 121–22. After reviewing all the files and the other evidence, the military judge found AB Cadavona guilty of possessing child pornography. R. at 263.

Additional facts are included *infra* as necessary.

## Argument

### I.

### THE GOVERNMENT'S SUBSEQUENT PROSECUTION OF AN OFFENSE KNOWN BEFORE A PREVIOUS COURT-MARTIAL CONSTITUTES PLAIN ERROR.

*Standard of Review*

This Court reviews forfeited issues for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)).

*Law and Analysis*

The government knew of all ultimately charged offenses prior to the initial court-martial. App. Ex. VII at 11–22. Rather than comply with the Rules for Courts-Martial (R.C.M.) outlining

joinder and severance, the government brought this case separately after securing a conviction at the first court-martial. R.C.M. 601(e)(2); 906(b)(10)(A). AB Cadavona did not raise an issue of joinder or severance at trial, but he also did not affirmatively waive it. Failure to raise a defense or objection forfeits that defense or objection absent an affirmative waiver. R.C.M. 905(e). Thus, this issue was forfeited and should be reviewed for plain error. *Gladue*, 67 M.J. at 313. Establishing plain error requires an appellant to prove three prongs: "(1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)).

*1. Not bringing all known charges at a single court-martial was clear and obvious error.*

"There is a 'general policy in the military favoring trial of all known charges at a single court-martial.'" *United States v. Giles*, 59 M.J. 374, 379 (C.A.A.F. 2004) (Crawford, C.J., dissenting) (quoting *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999)). This policy manifests in several sources. First, R.C.M. 307(c)(4) indicates that charges and specifications for all known offenses by a single accused may be preferred at the same time. R.C.M. 601(e)(2), *Joinder of Offenses*, similarly states that two or more offenses against the same accused may be referred to the same court-martial for trial, in the discretion of the convening authority and regardless of whether the offenses are related. The discussion accompanying this rule further asserts, "Ordinarily all known charges should be referred to a single court-martial." R.C.M. 601(e)(2), Discussion. Further, R.C.M. 906(b)(10)(A) states, "Offenses may be severed, but only to prevent manifest injustice." The discussion following this rule repeats the maxim that all known charges should ordinarily be tried at a single court-martial. R.C.M. 906(b)(10), Discussion.

The government did not try all known offenses against AB Cadavona in a single-court

martial, knowingly holding the offenses from this case to be tried after an earlier court-martial. The government knew of the offenses charged in this case as early as April 2020, when a law enforcement agent identified potential child pornography while searching AB Cadavona's iCloud backup file. R. at 49; PHO Exhibit 4, *Report of Investigation*, at 5. This led investigators to seek and obtain an expanded search warrant from a military judge on 6 April 2020. R. at 49; PHO Exhibit 4 at 5. A subsequent search reportedly found multiple files that apparently contained child pornography. App. Ex. VII at 2.[3] If any doubt remained, the government clearly knew of the misconduct alleged here by September 2020. A report dated 8 September 2020 indicates a reexamination of the iCloud file identified a number of files believed to contain child pornography. *Id.* at 11–22. The report lists those files, many of which the government ultimately listed as the bases for the charged offense.[4] *Id.*; App. Ex. XVI, *Bill of Particulars*.

Despite knowing about this alleged misconduct for almost a year, the government chose not to charge it when AB Cadavona was tried in March 2021. Pros. Ex. 12 (noting the sentencing date for AB Cadavona's prior court-martial was 25 March 2021). Instead, it waited almost another year after the first court-martial to prefer the charge in the instant case. DD Form 458, *Charge Sheet* (noting AB Cadavona was informed of the charges against him on 16 February 2022). This decision had the effect of severing known offenses, even though there is no indication that doing so was necessary to prevent manifest injustice, as required by R.C.M. 906(b)(10)(A). *United States v. Buhl*, 84 M.J. 501, 2023 CCA LEXIS 510, at *8–9 (A. Ct. Crim. App. 2023) (finding

[3] Although the first memorandum in App. Ex. VII is dated 26 March 2020, which would have been before the issuance of the expanded search warrant, the agent's digital signature at the end of the document shows a date of 12 August 2020. App. Ex. VII at 2–3. Thus, it seems likely that dating the memorandum 26 March 2020 was an error.

[4] The report also lists some files that were not later used to support the charged offense. *Compare* App. Ex. VII at 11–22 *with* App. Ex. XVI.

convening authority's decision to charge an additional offense after initial court-martial had the same effect as severing offenses).

Waiting to bring the current charge raises the possibility that the government saved this charge in case it was dissatisfied with the results of the first court-martial, and the results of the two courts do not dispel this possibility. *See Buhl*, 84 M.J. 501, 2023 CCA LEXIS 510, at *9–10. In *Buhl*, a case from the Army Court of Criminal Appeals, the appellant was acquitted of sexual assault at his first court-martial before being convicted of extramarital conduct based on the same incident at a subsequent court-martial. *Id.* at *2. The court set aside the findings and dismissed the charge and specification from the second court-martial after finding the convening authority abused their discretion by effectively severing the offenses from the two courts-martial. *Id.* at *10–11. In particular, the court noted its concern about the government's motivation in bringing the second case, saying, "Relying on our common sense and experience as practitioners, we are gravely concerned that this record bears the marks of simple dissatisfaction with the first trial's result, then overreaching by capriciously restyling and re-prosecuting the offense as extramarital conduct, when it was clear the government had the discretion, motivation, and evidence to charge that offense previously." *Id.* at *9–10.

While this case involves separate misconduct, unlike the new charge based on the same underlying misconduct in *Buhl*, the specter of dissatisfaction remains. *Id.* at *2. AB Cadavona could have been sentenced to a dishonorable discharge at his first court-martial, but the court adjudged only a bad-conduct discharge. Pros. Ex. 12; 2019 *MCM*, Part IV, ¶ 63.d (indicating a dishonorable discharge is within the maximum punishment for indecent recording and indecent broadcasting in violation of Article 120c, UCMJ, 10 U.S.C. § 920c). Returning to court and prosecuting another charge, which it "had the discretion, motivation, and evidence to charge" in

the earlier court-martial, gave the government a second opportunity to obtain a dishonorable discharge. *Buhl*, 84 M.J. 501, 2023 CCA LEXIS 510, at *10. It succeeded the second time when the military judge sentenced AB Cadavona to be dishonorably discharged from the service. R. at 329. It also allowed the government to more than triple the total time AB Cadavona spent in confinement without the possibility of him serving his sentences concurrently. *Compare* Pros. Ex. 12 *with* R. at 329 (showing AB Cadavona received seven months confinement from the first court-martial and 21 months confinement from the second).

This error was also plain and obvious because indicators of AB Cadavona's previous court-martial were abundant throughout the proceedings. The government initially gave notice of its intent to offer evidence of AB Cadavona's prior conviction under Mil. R. Evid. 404(b), which the Defense opposed via a motion in limine. App. Exs. IV–VII. Although the government ultimately decided not to offer that evidence, ample indicators of this conviction appear in the record from the motions practice on this topic. *Id.*; R. at 12. And the government did introduce the Entry of Judgment from AB Cadavona's prior court as an exhibit during the presentencing phase of the court. Pros. Ex. 12; R. at 269.

Just as the information about the prior court-martial was readily apparent, indications of when the government knew about this miscount abound in the record. The government's own attachments to its response to the Defense's motion in limine indicate that the government first learned of it in April 2020 and knew the details of what was ultimately charged by September 2020. App. Ex. VII. Likewise, the internal data pages from the Air Force Office of Special Investigations (OSI) plainly describe OSI learning about this misconduct in April 2020; indeed, OSI apparently submitted criminal indexing information for a child pornography offense on 28 May 2020. App. Ex. XIV at 1, 3. Based on ample evidence in the record, it was plain and

obvious that the government previously prosecuted AB Cadavona, knew of the charged offense before that court-martial, and chose not to prosecute it with the other charges. Combined with the unmistakable fact that the government was prosecuting AB Cadavona for the charged offense in the instant case, the error of not charging all known offenses in a single court-martial was clear and obvious.

*2. The error prejudiced AB Cadavona by forcing consecutive sentencing and putting him in an almost untenable position between trials.*

Finally, this error prejudiced AB Cadavona in several ways. Most notably, it allowed the government to force consecutive sentencing for multiple offenses. At the time of both of AB Cadavona's courts-martial, the UCMJ mandated that a military judge "shall specify whether the terms of confinement are to run consecutively or concurrently" when an accused is sentenced by military judge alone and is sentenced to confinement for more than one offense. Article 56(c)(2), UCMJ, 10 U.S.C. § 856(c)(2). Thus, if he was sentenced by military judge alone, AB Cadavona had a right to have a military judge determine whether multiple confinement sentences for different offenses would be consecutive or concurrent. AB Cadavona was sentenced by military judge alone in both of his courts-martial. Pros. Ex. 12; R. at 29, 329. In the first court-martial, the military judge adjudged confinement for multiple offenses and specified that all confinement sentences would run concurrently. Pros. Ex. 12. AB Cadavona served the entire term of confinement before the second court-martial. R. at 317; *see also* Pros. Ex. 12 (indicating the court sentenced AB Cadavona to serve a total of seven months in confinement). At the second court-martial, the military judge sentenced him to confinement for the only convicted charge, but the military judge could not determine whether this would run concurrently or consecutively with the confinement sentences from his prior court-martial because he already completed those sentences. R. at 317, 329. Had the government prosecuted all known charges in a single court-martial, the military

judge could have determined all confinement sentences would run concurrently, reducing the overall time AB Cadavona spent in confinement. Instead, the government ensured any confinement for the later charged offenses would be consecutive by bringing the charge after AB Cadavona completed his other confinement. This prejudiced AB Cadavona's substantial right to have a military judge determine whether confinement sentences for multiple offenses should run concurrently or consecutively.

Separating these known offenses also placed AB Cadavona in an almost untenable position between the courts-martial. After his release, he experienced significant issues with his pay, which forced him to rely on savings to pay basic living expenses. R. at 303. According to his supervisor, it was questionable whether he could afford basic living needs because he was not receiving pay. *Id.* He also was effectively restricted to Kadena Air Base because he would likely have trouble reentering the base if he left due to his prior conviction. R. at 304. As a result, AB Cadavona was stuck on an overseas base, barely able to pay for his basic needs, while he waited for his second court-martial. These issues stem from the government's decision to not charge all known offenses in a single court-martial. Indeed, uniquely military issues like these help explain why the military justice system favors trial of all known offenses at a single court-martial and utilizes a severance rule that is much narrower than its federal civilian counterpart. *Southworth*, 50 M.J. at 76 (quoting *Manual for Courts-Martial, United States* (1998 ed.), Drafter's Analysis of R.C.M. 906(b)(10) at A21–53). Had the government charged all known offenses together, it is far less likely the pay issues would have arisen, as AB Cadavona's pay would have continued uninterrupted until court-martial. After serving his sentence, AB Cadavona could have proceeded on appellate leave, assuming he still received a punitive discharge, allowing him to return to the United States and pursue other means of supporting himself. *See* Department of the Air Force Instruction 51-201,

*Administration of Military Justice*, Section 20M, paras. 20.53–20.56 (describing involuntary excess leave for members who received a punitive discharge while awaiting appellate review). Instead, the government's charging decisions left him in precarious circumstances between courts-martial, causing additional prejudice.

Because there was error, the error was clear and obvious, and it resulted in prejudice, AB Cadavona has met the plain error standard for this issue. The government should not have been permitted to prosecute this charge that it knew about since April 2020 after previously trying AB Cadavona for other offenses in 2021. Trying these offenses separately when it was not necessary to prevent manifest injustice contravened the severance rule in R.C.M. 906(b)(10)(A). Consequently, this Court should provide the same remedy the Army Court of Criminal Appeals provided in *Buhl* by setting aside the findings and sentence and dismissing the charge and specification. 84 M.J. 501, 2023 CCA LEXIS 510, at *11.

**WHEREFORE**, AB Cadavona respectfully requests this Honorable Court set aside the findings and the sentence and dismiss the Charge and its Specification.

## II.

## AIRMAN BASIC CADAVONA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL WITHDREW THE OBJECTION TO A MAJOR CHANGE TO THE SPECIFICATION, MAKING IT EASIER FOR THE GOVERNMENT TO MEET ITS BURDEN OF PROOF.

### *Additional Facts*

AB Cadavona was initially charged with two specifications that were identical except for the charged timeframes. DD Form 458, *Charge Sheet*. On the morning of the first day of trial, both parties requested changes to the specifications. R. at 31–36. The Defense asked to merge the specifications for findings because they were identical except the charged timeframes, which abutted, or possibly overlapped, each other. R. at 31. The government did not object to this, and

the military judge merged the specifications into one. R. at 33. The government then requested several additional changes, most of which the Defense did not oppose and the military judge granted. R. at 34–36. However, the Defense did object when the government asked to strike the words "within his iCloud account" from the specification. R. at 36. Trial defense counsel argued that this was not a minor change and that this language put the Defense on notice as to the manner in which the charged possession allegedly occurred. R. at 36. Before addressing this matter further, the military judge posed a question to trial defense counsel about the potential effects of this change on the possibility of new charges in the future. R. at 36. Trial defense counsel requested a 15-minute recess, and after that recess, they withdrew the objection. R. at 36–38. As a result, the military judge granted the government's request to remove the language from the specification. R. at 38, App. Ex. XVII.

*Standard of Review*

This court reviews allegations of ineffective assistance of counsel de novo. *U.S. v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

*Law and Analysis*

Withdrawing the objection to the government's requested change was an error that prejudiced AB Cadavona and constitutes ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, an appellant must demonstrate "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 288 (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). This test comes from the seminal case *Strickland v. Washington*, which also notes an appellant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. 668, 689 (1984). The United States Court of Appeals for the Armed Forces

(CAAF) uses a three-part test to determine whether this presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

*Palik*, 84 M.J. at 289 (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)).

AB Cadavona received ineffective assistance of counsel when his trial defense counsel withdrew the objection to a major change to the Specification. R. at 38. On the morning of trial, both parties requested changes to the Specifications, including a request from the Defense to merge the two specifications into one, which the military judge granted. R. at 31–36. The Defense did not object to most of the government's requested changes, but it did object when trial counsel asked to strike through the words "within his iCloud account." R. at 34–36. Trial defense counsel argued that this was not a minor change and that this language gave AB Cadavona notice of the way in which he allegedly possessed contraband material. R. at 36. However, after taking a recess to further consider the matter, trial defense counsel withdrew that objection. R. at 38.

Had the Defense maintained its objection to this change, it likely would have prevailed. Rule for Courts-Martial 603 governs changes to charges and specifications. According to that rule, "[a] major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged." R.C.M. 603(b)(1). The CAAF has previously held that a change which alters "the means of committing the offense" and "was not fairly included in the original specification" is a

major change. *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017). In contrast, minor changes are intended to allow the government to correct slight errors. *Id.* at 300–01. Here, the government's request to strike through the words "within his iCloud account" was a major change because it altered the means of committing the offense, adding all potential means of possession besides possession "within his iCloud account." Without this language, the government only had to prove AB Cadavona possessed the charged contraband somewhere, not necessarily within his iCloud account as originally charged. Such additional means of possession were not fairly included in the original Specification because of the language that limited the charged misconduct to possession within his iCloud account. Striking this limiting language opened the Specification to many potential forms of possession for which AB Cadavona was not previously on notice, adding substantial matters not previously included in the specification. Consequently, it was a major change.

Major changes after referral "may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew." R.C.M. 603(d)(1). Since the government's requested change was a major change, maintaining the defense objection to it would have prevented the government from making that change unless it withdrew the Specification, changed it, and referred the new specification. Thus, under these circumstances, it is reasonably probable that the Defense would have prevailed on a maintained objection by showing the proposed change was a major change that was prohibited at that stage of the court-martial.

The record shows no clear strategic reason for trial defense counsel's decision to withdraw this objection. Consequently, their performance on this discreet matter fell measurably below the performance expected of fallible lawyers. *See Palik*, 84 M.J. at 289. Trial defense counsel clearly recognized the problems with the government's request to strike the language "within his iCloud

account" from the specification, as evidenced by their prompt objection. R. at 36. By later withdrawing the objection, they allowed the government to make a major change after referral that reduced the government's burden of proof and broadened the potential conduct for which AB Cadavona could be convicted. In short, the withdrawal of this objection made it easier for the government to convict their client. This detrimental decision does not benefit from the presumption of competence because it had no evident strategic purpose. A decision that harms a client's interests and has no strategic purpose falls measurably below the expectations for trial defense counsel.

The remaining question is whether there is "'a reasonable probability that, absent the errors,' there would have been a different result." *Palik*, 84 M.J. at 289 (quoting *Gooch*, 69 M.J. at 362). Phrased another way, this Court must determine whether the deficiency "resulted in prejudice." *Id.* at 288 (quoting *Captain*, 75 M.J. at 101). There is such a reasonable probability here because of the chance that AB Cadavona may have been acquitted if the government could not make the major change to the specification. The fact that the government sought to remove the language "within his iCloud account" from the Specification insinuates that the government was concerned about its ability to prove this allegation. R. at 35–36. The record shows why the government would be so concerned. The evidence ultimately adduced at trial indicated the charged materials were identified within an automatic iPhone backup file in an iCloud account. R. at 82–85, 89. According to the government's own expert, such iPhone backups generally occur by default, without the user initiating the backup, and a user likely cannot view the contents of a backup file from a phone without resetting the phone and using the backup file to restore its contents. R. at 137–38, 140. When the government narrows the scope of a charged offense by alleging particular facts, it is "required to prove the facts as alleged." *United States v. English*, 79

M.J. 116, 120 (C.A.A.F. 2019) (citing *United States v. Reese*, 76 M.J. 297, 300–01 (C.A.A.F. 2017)). Considering the automatic nature of the file here, the government likely would have struggled to prove AB Cadavona knowingly possessed the charged materials "within his iCloud account."[5] Despite its initial charging scheme, the theory the government ultimately argued was that AB Cadavona knowingly possessed these files on his phone. R. at 237–48. This evidence and this argument alone would not have been enough to prove knowing possession within his iCloud account. Had the Defense maintained its objection and required the government to prove this part of the Specification, it is at least reasonably probable the result of the trial would have been different.

Withdrawing the Defense's objection and allowing the government to make a major change to the Specification after referral was an error that paved the way for the government to convict AB Cadavona. Since this decision was not based on any sound strategy, it was an unreasonable performance that constitutes ineffective assistance of counsel. *See Palik*, 84 M.J. at 289.

**WHEREFORE**, AB Cadavona respectfully requests this Honorable Court set aside the findings and the sentence.

## III.

## A 224-DAY POST-TRIAL PROCESSING PERIOD WITHOUT A DISCERNABLE EXPLANATION WARRANTS RELIEF.

*Additional Facts*

The court announced AB Cadavona's sentence on 27 October 2022. R. at 329. Following AB Cadavona's clemency request, the convening authority signed the decision on action on 17

[5] The charged offense has two elements: (1) that the accused knowingly and wrongfully possessed child pornography and (2) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. 2019 *MCM*, Part IV, ¶ 95(b)(1).

November 2022. CADA, undated (signature dated 17 November 2022). The court reporter prepared a transcript of proceedings, certifying the transcript on 3 January 2023 after trial and defense counsel reviewed it. Certification of the Transcript, 3 January 2023; Court Reporter Chronology, 21 January 2023. The court reporter also certified the record of trial (ROT) on 9 December 2022. Certification of the Record of Trial, 9 December 2022. AB Cadavona received a copy of the ROT on 22 March 2023. ROT Receipt, 22 March 2023. This case was docketed with this Court on 8 June 2023.

*Standard of Review*

"This [C]ourt reviews de novo whether an appellant's due process rights are violated because of post-trial delay." *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

*Law and Analysis*

The 224-day delay from sentencing to docketing is both presumptively unreasonable and unexplained, and this Court should grant relief by reducing the dishonorable discharge to a bad-conduct discharge. Service members have a right to timely post-trial appellate review of court-martial convictions. *Moreno*, 63 M.J. at 135; *Livak*, 80 M.J. at 633. The CAAF previously established specific standards for post-trial processing, including 120 days between completion of trial and convening authority action and 30 days between convening authority action and docketing at the service court of criminal appeals. *Moreno*, 63 M.J. at 142. The CAAF applied a presumption of unreasonable delay to cases exceeding these time standards. *Id.* Subsequent changes in post-trial processing procedures have displaced these two particular standards, but this Court has held that the aggregate standard, 150 days between sentence and docketing, still applies to determine whether post-trial processing delays are facially unreasonable. *Livak*, 80 M.J. at 633.

Here, 224 days elapsed between AB Cadavona's sentencing on 27 October 2022 and the docketing of his case with this Court on 8 June 2023. As this well exceeds the 150-day standard recognized in *Livak*, this delay is facially unreasonable. 80 M.J. at 633. A facially unreasonable delay triggers a due-process analysis using four factors identified in *Moreno*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four factors are balanced, and no single factor is necessary or sufficient to find a due process violation. *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

The first factor weighs clearly in favor of AB Cadavona. The 224 days from announcement of his sentence to docketing with this Court does not just exceed the 150-day standard; it does so by a significant amount. It took the government 74 days more than this standard to docket the case, exceeding the threshold recognized by this Court by 49 percent. *See Livak*, 80 M.J. at 633. This factor favors AB Cadavona.

The second factor, the reasons for the delay, is the most strongly in favor of AB Cadavona because the record of trial reveals no discernable reason for this delay. Significant post-trial procedures seem to have been completed efficiently. The convening authority signed the CADA less than a month after sentencing, and the court reporter certified the transcript 68 days after sentencing. R. at 329; CADA; Certification of the Transcript. Thus, the government had a certified transcript and completed convening authority action with more than half of the 150-day standard remaining to timely docket this case. It is not clear from the record what else, if anything, needed to be accomplished before the case could be docketed, but the government did not proceed expeditiously. AB Cadavona even received a copy of the ROT on 22 March 2023, 146 days after sentencing. ROT Receipt. The record must have been ready for docketing, or very nearly so, at

that point if the ROT was ready to be served on AB Cadavona, and the government could have avoided the presumptively unreasonable delay by docketing the case at or near that time. Instead, the government inexplicably took 78 additional days to get the case docketed with this Court, violating the standard for speedy post-trial processing. Such an unexplained delay despite seemingly timely intermediate steps demonstrates gross indifference and institutional neglect towards punctually completing the post-trial processing. *See United States v. Turpiano*, No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *12–16 (A.F. Ct. Crim. App. Sept. 10, 2019) (finding the second *Barker* factor weighed heavily in favor of appellant where unique circumstances contributed to specter of gross indifference or institutional neglect). The reasons, or lack thereof, for the post-trial delay weigh strongly in AB Cadavona's favor.

The third factor, whether AB Cadavona asserted the right to timely review and appeal, should not weigh heavily against him. AB Cadavona has not previously asserted the right to timely appellate review of his conviction, but he does so now in conjunction with this assignment of error. Even when an appellant has not asserted this right, the CAAF has previously found it weighs only slightly against the appellant because the government ultimately bears the obligation to ensure a timely review. *Moreno*, 63 M.J. at 138 (citing *United States v. Bodkins*, 60 M.J. 322, 323–24 (C.A.A.F. 2004)). As the CAAF stated in *Moreno*, "[The appellant] bears no responsibility for transmitting the record of trial to the Court of Criminal Appeals after action." *Id.* A delay in this transmittal is at issue here, so although this factor may not favor AB Cadavona, it should not weigh significantly against him.

The fourth and final factor is whether the delay prejudiced AB Cadavona. The CAAF has previously recognized three interests in which prejudice from post-trial delays may appear: (1) oppressive incarceration pending appeal, (2) anxiety and concern, and (3) impairment of the ability

to present a defense at a rehearing. *Id.* at 138–41. AB Cadavona acknowledges that the third interest is unlikely to be a source of prejudice here because the evidence that would likely be at issue in a rehearing—primarily digital records—is of a nature that is less likely to degrade over time. However, the excessive post-trial delay did affect the other two interests. As described in the first assignment of error *supra*, the government's decisions in this case already caused AB Cadavona to serve as much time in confinement as possible by foreclosing the chance of concurrent sentencing for multiple offenses, and the post-trial delay further ensured he would remain confined by delaying his opportunity to seek appellate relief that could reduce his confinement. Indeed, the delay substantially increased the probability that AB Cadavona would complete his confinement before receiving appellate review, which ultimately came to fruition. *See* R. at 329 (sentencing AB Cadavona to be confined for 21 months). AB Cadavona also experienced particularized anxiety and concern. As he told the court-martial, he wanted to kill himself when he was previously in confinement, and ensuring he remained confined by delaying the post-trial processing could only further this acute distress. R. at 317. For these reasons, the delay prejudiced AB Cadavona.

If this Court finds no prejudice, it can still find a due process violation when the other factors show "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). This Court, in an unpublished opinion, has previously found a due process violation on this basis because of an egregious and unjustified delay even though, as here, the appellant asserted his right to timely appellate review for the first time in his initial brief. *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *13-15 (A.F. Ct. Crim. App. Nov. 2, 2023). The Court should reach the same conclusion here because the

government exceeded the 150-day standard by 49 percent without any justification. Most troublingly, the government seemingly had a record of trial ready within the established standard, yet it inexplicably waited to forward the record to the Court for docketing while the 150-day threshold passed and AB Cadavona sat in confinement. Such an unjustified delay adversely affects public perception of fairness and integrity of the military justice system by creating the perception the government held the record simply to delay appellate review and minimize the chance for AB Cadavona to reduce his time in confinement. Thus, the delay constitutes a due process violation, which is a constitutional error, and the government cannot meet its burden of showing this error was harmless beyond a reasonable doubt. *Toohey*, 63 M.J. at 362–63 (citing *United States v. Cendejas*, 62 M.J. 334, 337 (C.A.A.F. 2006)). Consequently, the Court should grant relief.

Even if the Court does not find a due process violation, it can still grant relief for excessive post-trial delay. *Livak*, 80 M.J. at 633 (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016)). This stems from the Court's authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *Id.* This Court uses a six-factor analytical framework to determine whether such relief is appropriate:

> 1. How long did the delay exceed the standards set forth in [*Moreno*, 63 M.J. 129]?
>
> 2. What reasons, if any, has the government set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
>
> 3. Keeping in mind that [the Court's] goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
>
> 4. Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline?

> 5. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
>
> 6. Given the passage of time, can this court provide meaningful relief in this particular situation?

*Gay*, 74 M.J. at 744. Here, these factors favor relief. The post-trial delay exceeded the *Moreno* standard, as interpreted by this court, by 74 days, a significant amount that constitutes a 49 percent increase in the expected time. *Livak*, 80 M.J. at 633. Moreover, the government had no reason for this delay, especially since the preparation of the record, which often takes significant time, was seemingly completed well before the threshold passed. Allowing a completed record to simply sit for no apparent reason demonstrates a level of gross indifference and institutional neglect. There was also some harm from this delay, as AB Cadavona remained confined while the government delayed his post-trial review.

Despite the passage of time, this Court can grant meaningful relief by reducing the adjudged dishonorable discharge to a bad-conduct discharge. AB Cadavona has already completed his adjudged term of confinement, so a reduction in confinement would not provide meaningful relief at this point. Reducing the permanent stigma of a punitive discharge, however, would make a meaningful difference on AB Cadavona's future. Further, this relief is consistent with the dual goals of justice and good order and discipline because AB Cadavona would still receive a punitive discharge and already served confinement. This Court similarly reduced a dishonorable discharge to a bad-conduct discharge in *Lampkins* because of post-trial delays, and it should do the same here as a result of the government's inexplicable delay in completing its post-trial processing obligations and forwarding the record for docketing. 2023 CCA LEXIS 465, at *2, 30.

**WHEREFORE**, AB Cadavona respectfully requests this Honorable Court affirm only so much of the sentence that includes a reprimand, confinement for 21 months, and a bad-conduct discharge.

## IV.

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

*Additional Facts*

The first indorsements to both the Entry of Judgment and Statement of Trial Results state that AB Cadavona is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgment, 6 December 2022; Statement of Trial Results, 31 October 2022.

*Standard of Review*

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

*Law and Analysis*

*1. Section 922 is unconstitutional as applied to AB Cadavona.*

The test for applying the Second Amendment is as follows:

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

*Bruen*, 597 U.S. at 24 (quoting *United States v. Konigsberg*, 366 U.S. 36, 50, n.10 (1961)).

Although the annotation that Section 922 applies to the case is vague, the Government presumably intended to apply Section 922(g)(1), which 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 AB Cadavona, who stands convicted of an offense that has historically not merited firearms restrictions. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The historical tradition took a narrower view of firearms regulation for criminal acts than that reflected in Section 922:

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

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701, 704 (quoting 1926 Uniform Firearms Act §§ 1, 4). 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 (quoting 1926 Uniform Firearms Act § 1). The offense of which AB Cadavona was convicted falls short of these. 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 § 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' imprisonment. *Range v. AG United States*, 69 F.4th 96, 98 (3d Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (Jun. 21, 2024)). Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. The real question, then, is whether AB Cadavona's conviction meets the historical tradition of regulating firearms based on a limited framing of "violent."

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

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

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal 'felon' disability--barring any person convicted of a crime punishable by more than a

year in prison from possessing any firearm--is less than [64] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

All the arguments above demonstrate that possession of child pornography does not qualify for a lifetime ban on firearms. The recent case of *United States v. Rahimi* does not change the analysis. 602 U.S. ___, 144 S. Ct. 1889 (2024). In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. *Id.* at 1901–02. The Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1901.

But the historical analogue breaks down when applied here. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 1902. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, this case never involved a threat, with a weapon or otherwise, and the firearms ban will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding. As the Supreme Court stated, "We conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 1903. Such a narrow holding cannot support the broad restriction encompassed here.

*2. This Court may order correction of the Entry of Judgment.*

In *United States v. Lepore*, citing the R.C.M. in the 2016 *MCM*, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. Recently, this Court further concluded that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review." *United States v. Vanzant*, __ M.J. __, No. 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. May 28, 2024).

However, in *Lemire*, 82 M.J. at n*, the CAAF "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." The CAAF's direction to fix the promulgating order is at odds with this Court's holdings in *Lepore* and *Vanzant*, and it reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[6] Second, the CAAF believes that CCAs have the power to address collateral consequences under Article 66 as well since it "directed" a CCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral

[6] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." 2019 *MCM*, App. 15 at A15–22.

consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the R.C.M.—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. In the 2019 *MCM*, both the Statement of Trial Results and Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, 14 April 2022, ¶ 29.32, the Statement of Trial Results and Entry of Judgment must include whether the offenses trigger a prohibition under Section 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now require—by incorporation—a determination of whether the firearm prohibition is triggered.[7] Thus, this Court can rule in AB Cadavona's favor without taking the case en banc.[8] If this Court disagrees, AB Cadavona offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

**WHEREFORE**, AB Cadavona respectfully requests this Court hold Subsection 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the Entry of Judgment and Statement of Trial Results to indicate that no firearm prohibition applies in his case.

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[7] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N-M. Ct. Crim. App. Oct. 18, 2021) (ordering correction of a Statement of Trial Results because it incorrectly stated Section 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (Mar. 17, 2022) (ordering correction of the Statement of Trial Results to change the Subsection 922(g)(1) designator to "No").

[8] AB Cadavona recognizes this Court has repeatedly ruled against this argument. *See, e.g.*, *United States v. Vanzant*, 2024 CCA LEXIS 215, at *23–26. However, this Court has not yet addressed the question of whether the Rules change provides a basis for this Court to reach a different result.

Respectfully submitted,

[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 August 2024.

Respectfully submitted,

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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40476** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Ian J.B. CADAVONA** | ) | |
| **Airman Basic** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 13 August 2024, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective when they withdrew their objection to a major change to the Specification of the Charge.

On 20 August 2024, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Major Shea L. Hoxie and Major Emily K. Johnson, to provide declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide a declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days after the court's receipt of the declarations to submit its answer. Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 29th day of August, 2024,

**ORDERED:**

The Government's Motion to Compel Declarations is **GRANTED**. Major Shea L. Hoxie and Major Emily K. Johnson are each ordered to provide a declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective when they withdrew their objection to a major change to the Specification of the Charge.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **30 September 2024.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

**It is further ordered:**

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **15 October 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,* | ) | UNITED STATES' MOTION<br>FOR ENLARGEMENT OF TIME |
| v. | ) | No. ACM 40476 |
| Airman Basic (E-1)<br>**IAN J.B. CADAVONA,**<br>United States Air Force,<br>*Appellant.* | ) | Before Panel No. 1<br><br>20 August 2024 |

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests an enlargement of time to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Declarations and asked this Court to order Appellant's trial defense counsel, Maj S.H. and Maj E.J., to each provide a declaration in response to Appellant's alleged ineffective assistance of counsel claims. The United States seeks a fourteen-day enlargement of time following the submission of the declarations to this Court from Maj S.H. and Maj E.J., to respond properly and completely to Appellant's brief. To avoid any confusion, the United States respectfully requests that this Court set specific due dates for both the declarations and brief.

The United States' Answer to Appellant's Assignment of Errors brief is currently due to the Court on 12 September 2024. Undersigned counsel will require a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claims. Good cause exists to grant this request. Undersigned counsel needs this additional time to address properly Appellant's ineffective assistance of counsel claims, which cannot be analyzed until the declarations of Maj S.H. and Maj E.J. are received. Barring unforeseen

circumstances, the United States believes fourteen days is sufficient to prepare a proper and responsive brief for this Honorable Court on this issue once the ordered declarations are received.

This case was docketed with the Court on 8 June 2023. Appellant filed his Assignments of Error brief with this Honorable Court on 13 August 2024, 432 days after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 439 days have elapsed since docketing.

WHEREFORE, the United States requests this Court grant this Motion for Enlargement of Time.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 August 2024 via electronic filing.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,* | ) | UNITED STATES' MOTION<br>TO COMPEL DECLARATIONS |
| v. | ) | No. ACM 40476 |
| Airman Basic (E-1)<br>**IAN J.B. CADAVONA,**<br>United States Air Force,<br>*Appellant.* | ) | Before Panel No. 1<br><br>20 August 2024 |

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Maj S.H. and Maj E.J., to each provide a declaration in response to Appellant's allegations that they provided ineffective assistance of counsel.

Maj S.H. and Maj E.J. represented Appellant at his trial. Appellant filed his Assignments of Error with this Court on 13 August 2024, alleging in Issue II that his trial defense counsel were ineffective when they withdrew their objection to an allegedly major change to the Specification of the Charge. The United States has requested a declaration from each counsel to address the alleged ineffective assistance of counsel, and they stated they would not do so without an order from this Court.

The United States requires a declaration from Maj S.H. and Maj E.J. to respond adequately to Appellant's brief and his ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining a declaration from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Declarations are necessary in this case, because the allegations of ineffective assistance of counsel involve a strategic

decision to withdraw an objection not explained on the record. Only Appellant's trial defense counsel can explain such a strategic decision that Appellant now challenges.

Accordingly, the United States respectfully requests this Court order Maj S.H. and Maj E.J. each to provide a declaration with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

WHEREFORE, the United States requests this Court grant this Motion to Compel Declarations.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 August 2024 via electronic filing.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,* | ) | UNITED STATES' MOTION TO ATTACH DOCUMENTS |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1)<br>**IAN J.B. CADAVONA,**<br>United States Air Force,<br>*Appellant.* | ) | No. ACM 40476<br><br>20 September 2024 |

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure and the Court's 29 August 2024 Order granting the United States' 20 August 2024 Motion to Compel Declarations, the United States hereby submits this Motion to Attach Documents, that is, the declarations of Appellant's two trial defense counsel: Maj Shea L. Hoxie and Maj Emily K. Johnson. These declarations are responsive to this Court's Order and essential for the Court to adjudicate Appellant's claim of ineffective assistance of said counsel.

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

[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 September 2024 via electronic filing.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**, *Appellee,* | ) | ANSWER TO ASSIGNMENTS OF ERROR |
| v. | ) | Before Panel No. 1 |
| Airman Basic (E-1) **IAN J.B. CADAVONA,** United States Air Force, *Appellant.* | ) | No. ACM 40476 |
| | ) | 15 October 2024 |

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

## ISSUE PRESENTED

**I.**

**WHETHER THE GOVERNMENT'S SUBSEQUENT PROSECUTION OF AN OFFENSE KNOWN BEFORE A PREVIOUS COURT-MARTIAL CONSTITUTES PLAIN ERROR.**

**II.**

**WHETHER [APPELLANT] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL WITHDREW THE OBJECTION TO A MAJOR CHANGE TO THE SPECIFICATION, MAKING IT EASIER FOR THE GOVERNMENT TO MEET ITS BURDEN OF PROOF.**

**III.**

**WHETHER A 224-DAY POST-TRIAL PROCESSING PERIOD WITHOUT A DISCERNABLE EXPLANATION WARRANTS RELIEF.**

**IV.**

**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 A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION.**

## STATEMENT OF CASE

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

## STATEMENT OF FACTS

Facts are included, if necessary, for each Issue below.

## ARGUMENT

### I.

**IT WAS NOT ERROR, LET ALONE PLAIN ERROR, FOR THE GOVERNMENT TO PROSECUTE APPELLANT FOR TWO SETS OF CRIMES IN TWO SEPARATE COURTS-MARTIAL, BECAUSE THERE IS NO RIGHT TO BE PROSECUTED IN ONE TRIAL FOR ALL POSSIBLE OFFENSES.**

### *Additional Facts*

Appellant was convicted in his first court-martial, on 25 March 2021, pursuant to his pleas of guilty for indecent recording and indecent broadcasting involving A1C G.K.K. in August 2019, and obstruction of justice related to those charges. (Pros. Ex. 12.) The military judge sentenced him to a bad-conduct discharge, seven months in confinement, and reduction in pay grade to E-1. (Id.) During the proceedings, the issue of the child pornography material came up in the context of a Rule 404(b) motion, but at no time did the defense make a motion to join such allegations into the court-martial. (Appellant's first court-martial proceeding, 18 March 2021, pp. 117-19.)

During presentencing in this second court-martial, for child pornography charges committed from February 2017 through March 2020 (ROT, Vol. 1, *Charge Sheet*), in Appellant's unsworn statement, he said, "I have known a second court-martial is coming since before my first court went to trial." (R. at 316.) In trial defense counsel's presentencing argument, she said, "He

already knew that this court-martial was coming before he even went to trial the first time." (R. at 323-24.) At no time during Appellant's second court-martial, did he make a motion to dismiss the charges.

***Standard of Review***

Appellate courts review forfeited issues for plain error. United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017). To prove plain error, an appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014).

***Law***

RCM 307(c)(4) states, "Multiple offenses. Charges and specifications alleging all known offenses by an accused may be preferred at the same time."

R.C.M. 601(e)(2) states:

> Joinder of offenses. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless of whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

***Analysis***

Appellant claims it was "clear and obvious error" for the government to not bring all "known charges" at a single court-martial. (App. Br. at 4.) However, he does not provide or proffer evidence regarding continuing investigative steps and when the government was ready to prefer "known" child pornography charges against him. Appellant cites to the OSI internal data pages (IDP) to point out when the government "learned about" the suspected child pornography.

(App. Br. at 7 (citing App. Ex. XIV, pp. 1, 3).) But he fails to cite subsequent pages from the IDPs through 3 May 2022 that showed OSI continuing to investigate diligently the allegations after his first court-martial. For example, the OSI had to conduct the following steps before suspicions and allegations were sufficient to become charges: (1) review of electronic evidence from Appellant's various other devices seized by the OSI detachment; (2) utilization of a "filter team" to avoid potential review of privileged material; (3) coordination with the Department of Defense Cyber Crime Center ("DC3") and National Center for Missing & Exploited Children (NCMEC) data; (4) service of preservation letters and search warrants to private entities, such as MEGA, Mediatti, and others; and (5) conducting other investigative activities such as records checks and witness interviews. (App. Ex. XIV, pp. 14-22.) Nor does Appellant account for subsequent factual and legal reviews, drafting of charges, and proceeding with other stages in the court-martial process. Moreover, because Appellant failed to raise this issue at trial, he deprived the government of the opportunity to present evidence specifically explaining why it chose to charge the child pornography offenses at a separate court-martial. Since the government was not given that opportunity, this Court should decline to find plain and obvious error.

Even if Appellant had demonstrated the government could reasonably have been prepared to prefer and refer child pornography charges before his first court-martial, there was no error. Appellant cites a "general policy in the military favoring trial of all known charges at a single court-martial." (App. Br. at 4 (citing United States v. Giles, 59 M.J. 374, 379 (C.A.A.F. 2004) (Crawford, C.J., dissenting) (quoting United States v. Southworth, 50 M.J. 74, 76 (C.A.A.F. 1999)).) He then cites R.C.M. 307(c)(4), which states charges and specifications for all known offenses by a single accused may be preferred at the same time. (Id.) Appellant also cites R.C.M. 601(e)(2), which grants convening authorities the discretion to refer two or more offenses against

the same accused to the same court-martial, regardless of whether the offenses are related. (Id.) And he quotes the discussion to Rule 601(e)(2), "Ordinarily all known charges should be referred to a single court-martial." (Id.) Finally, he cites R.C.M. 906(b)(10)(A) and its discussion that allows severance of offenses, but only to prevent manifest injustice, because all known charges should ordinarily be tried at a single court-martial.

The cases and rules Appellant cites make clear that the convening authority has discretion, but is not required, to join charges. The Court of Appeals for the Armed Forces has acknowledged that R.C.M. 601(e)(2) merely "encourages" the joinder of all known offenses at one trial. United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002). Providing discretion and encouraging the convening authority to join charges promotes judicial economy, but it does not create a substantive, enforceable right for an accused. Appellant cites no case to the contrary.

Appellant fails to acknowledge multiple cases in which this Court held there is no requirement to bring all charges in one court-martial. In United States v. Alexander, 29 M.J. 877 (A.F. Ct. Crim. App. 1989), this Court stated, "If our historical analysis is correct, there is no current requirement that all known charges be brought at one time." Id. at 879.

In United States v. Johnson, No. ACM 32830, 1999 CCA LEXIS 121 (A.F. Ct. Crim. App. 12 Apr. 1999) (unpub. op.), the accused was charged with, but not yet tried for, misusing her American Express (AMEX) card, stealing and using or attempting to use AMEX cards of other military members, using her roommate's social security number and other personal information, and lying to investigators, when law enforcement discovered additional similar crimes. Id. at *2. The defense entered a motion seeking a continuance to allow for joinder of the new charges, but the military judge denied it. Id. This Court said, "[I]t is clear from that discussion and the Rules for Courts-Martial that the decision to try charges in a single trial or separately is left to the

discretion of the convening authority." Id. at *5. "[T]here is no mandate requiring preferral of all known charges at one time." Id. (citing United States v. Whitfield, 35 M.J. 535, 537 (A.C.M.R. 1992), *aff'd*, 38 M.J. 167 (C.M.A. 1993)).

In United States v. Booker, 62 M.J. 703 (A.F. Ct. Crim. App. 2006), this Court issued a published opinion affirming the military judge's denial of a defense motion to abate the proceedings to permit joinder of additional charges, even where the only government explanation offered for the separate referrals was a concern about how joining the additional charges would affect the maximum punishment of the original special court-martial. Id. at 707. Because the accused in Booker made such a motion, this Court reviewed the convening authority's and military judge's decisions for abuse of discretion. Id.

Those cases confirm there was no requirement for the government to charge Appellant with all possible charges in one court-martial. Even if, for argument's sake, the convening authority was required to bring all known charges in one trial, Appellant cannot show prejudice, where he failed to raise the issue before trial. Appellant turns the usual defense argument on its head. Ordinarily, an accused moves to sever unrelated charges, arguing that joinder would be prejudicial "manifest injustice," even if the military judge instructs the members against improper "spillover" between or among the charges. *See, e.g.*, United States v. Silvernail, No. ACM 39618, 2021 CCA LEXIS 427, *25-35 (A.F. Ct. Crim. App. 25 Aug. 2021) (unpub. op.); United States v. Brown, No. ACM 39728, 2021 CCA LEXIS 414, *21-26 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.); United States v. Kerns, 75 M.J. 783, 795 (A.F. Ct. Crim. App. 2016).

Appellant cites the dissent in Giles for the policy favoring joinder of charges. (App. Br. at 4 (citing Giles, 59 M.J. at 379 (Crawford, C.J., dissenting) (quoting Southworth, 50 M.J. at 76)). However, the Court in Giles found impermissible spillover and manifest injustice in *not severing*

unrelated offenses, despite the military judge's limiting instructions to the members. 59 M.J. at 378.

Appellant is not alleging the charges from his two courts-martial overlap and, thus, there was a Double Jeopardy violation. Therefore, his reference to the Army case of United States v. Buhl, 84 M.J. 501, 2023 CCA LEXIS 510 (A. Ct. Crim. App. 2023), where the accused was prosecuted a second time for the same incident, but under different charges, is inapplicable. *See* Id. at *2. Appellant's Assignment of Error momentarily acknowledges this distinction, but then discounts it, stating, "While this case involves separate misconduct, unlike the new charges based on the same underlying misconduct in Buhl, the specter of dissatisfaction remains." (App. Br. at 6.) He claims the second prosecution provided a second opportunity to obtain a dishonorable discharge, and precluded Appellant from receiving concurrent sentences of seven months and 21 months for the two sets of charges. (App. Br. at 7-8.) Appellant assumes, wrongly, that he would not have been adjudged a dishonorable discharge if all the charges had been consolidated into the first court-martial. And he assumes the military judge would have adjudged concurrent sentencing. He fails to recognize the military judge was aware Appellant had completed his sentence from his first court-martial, and the military judge might have factored that into the sentence in the second court-martial.

Appellant raises the collateral issue of financial issues that resulted from his first court-martial. (App. Br. at 9.) That is, because he was facing new court-martial charges after he left confinement, he could not go on excess appellate leave away from Kadena Air Base and, because he was not receiving military pay, he had little funds to pay for basic needs. Those were, however, collateral consequences of Appellant's crime, and he does not allege the government delayed charging him with intent to cause him financial harm. As stated in Booker, in reviewing the

convening authority's exercise of discretion, service courts have been reluctant to find an abuse of discretion absent evidence of government misconduct. 62 M.J. at 707 (citations omitted). Appellant does not allege government misconduct, and the convening authority did not abuse his discretion.

Because Appellant has demonstrated no error, let alone one that was plain and obvious and resulted in material prejudice to his substantial rights, his assignment of error should be denied, and his conviction and sentence should be affirmed.

**II.**

**APPELLANT'S WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE TRIAL DEFENSE COUNSEL ACTED REASONABLY IN WITHDRAWING THEIR OBJECTION TO THE GOVERNMENT'S CHANGE TO THE SPECIFICATION, DEFENSE COUNSEL'S DECISION DID NOT FALL MEASURABLY BELOW THE PERFORMANCE ORDINARILY EXPECTED OF FALLIBLE LAWYERS, AND THERE WAS NO REASONABLE PROBABILITY THAT, BY MAINTAINING THE OBJECTION, APPELLANT WOULD NOT HAVE BEEN CONVICTED.**

***Additional Facts***

On 31 May 2022, the defense moved to compel a bill of particulars from the government to describe what evidence was to be used to prove the charges against Appellant. (App. Ex. VIII.) The defense acknowledged that the evidence came from Appellant's iCloud account. (Id., para. 2.)[1] On 1 June 2022, the government provided the requested bill of particulars. (App. Ex. X.) For

[1] The OSI computer forensic report dated 8 September 2020, Cellebrite report from 15 November 2021, and excerpts from another OSI report also described that the suspected child pornography came from Appellant's iCloud account uploaded from his iPhone 6S. (App. Ex. VII, Atch. 3, pp. 11-18, Atch. 4, p.24-25, Atch 5, pp. 28-29.)

every image and video listed, the government confirmed they came from Appellant's iCloud data uploaded from his iPhone 6S. (Id.)

During arraignment on 25 October 2022, the military judge and the parties went over the proposed changes to the Charge Sheet. (R. at 31.) The government proposed several changes, to all of which the defense agreed except one. (Id.) The parties agreed to the merger of the two original specifications, because they were identical except for the timeframes, which were directly adjacent to each other. (Id.)[2] There were several other minor changes to the language of the specification. (R. at 32-36.) The one disagreement between the parties was the government's motion to strike the words "within his iCloud account," which the defense originally argued was not a minor change, because it "put the defense on notice that the way in which the possession occurred was within an iCloud account." (R. at 36.) The military judge asked the circuit defense counsel whether sustaining their objection could lead to a third prosecution of Appellant without violating the Double Jeopardy clause of the U.S. Constitution:

> First question, do you agree, if I was to agree with you, that the government could then come back and recharge your client without that language and it would not be double jeopardy, because as it is right now it's specific as far as it's within the iCloud account. So, I have no clue what's going to happen in this court, but let's say for

[2] Specification 1 of the Charge stated:

> In that [Appellant] … did, at or near Kadena Air Base, Okinawa, Japan, between on or about 17 February 2017 and on or about 31 December 2018, within his iCloud account, knowingly and wrongfully possess child pornography, to wit: videos of minors, or what appears to be minors, engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.

(ROT, Vol. 1, *Charge Sheet*.) Specification 2 of the Charge contained the identical language, except the dates were "between on or about 1 January 2019 and on or about 22 October 2019." (Id.) After the merger and other modifications, the dates of the merged Specification were "between on or about 17 February 2017 and on or about 31 March 2020." (ROT, Vol. 1, *Entry of Judgment*.)

> whatever reason I was to find your client not guilty. They have chosen to charge him specifically within his iCloud account. If they chose to charge him without that what is your position on that? And do you need a moment? And do you need a recess?

(R. at 36.)

The defense asked for a recess and, upon reconvening, withdrew their objection to the remove of "within his iCloud account" without explaining on the record their reason for doing so. (R. at 36, 38.) The military judge granted the government's request to remove the language from the specification. (R. at 38; *see* App. Ex. XVII.)

During trial, the contraband evidence presented was obtained from a search warrant for Appellant's iCloud account backup for his iPhone 6S. (R. at 49-51, 65-66, 80, 84-90, 118, 120-23, 126-30, 140, 160, 180, 183, 237-38, 256-57; Pros. Exs. 1-3, 5-8.)

Since Appellant submitted his Assignments of Error, the United States filed, on 20 August 2024, a Motion to Compel Declarations from Appellant's trial defense counsel. This Court granted the Motion on 29 August and, pursuant to that Order, the United States submitted a Motion to Attach those declarations on 20 September 2024.

In their declarations, trial defense counsel explained they discussed the pros and cons and strategic reasoning for withdrawing the objection, and Appellant agreed to doing so. (Maj Hoxie Declaration, paras. 4, 8; Maj Johnson Declaration, paras. 4, 8.) The change to the charge did not impact the defense theory that the government could not prove the possession of the child pornography was knowing. (Maj Hoxie Declaration, para. 5; Maj Johnson Declaration, para. 5.) Defense counsel explained to Appellant that withdrawing the objection increased the likelihood that double jeopardy would attach, and the government would not be able to bring a third prosecution for evidence of child pornography from other than within the iCloud account. (Maj Hoxie Declaration, para 6; Maj Johnson Declaration, para. 6.) Finally, based on consultation with

their own experts, the defense believed that the government was not aware of a significant amount of "inflammatory and extremely inculpatory" evidence that was in their possession. (Maj Hoxie Declaration, para. 7; Maj Johnson Declaration, para. 7.) Thus, the defense strategized that moving the court-martial forward, with finality, ensured the government did not later discover the import of the additional evidence. (Id.)

***Standard of Review***

Allegations of ineffective assistance of counsel are reviewed *de novo*. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

***Law***

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. Amend. VI; United States v. Strickland, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance… of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (citation and quotations omitted). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697. "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion…, an appellant must show that there is a reasonable probability that such a motion would have been meritorious." United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001) (internal citation omitted).

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation and quotations omitted). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

***Analysis***

Appellant claims his trial defense counsel were constitutionally ineffective when they withdrew their objection to the change to the charge that removed the term "within his iCloud account." (App. Br. at 11-15.) That claim is without merit, because Appellant fails to meet any of the three prongs of the Strickland test.

**1. Trial defense counsel had good reason for agreeing to the change, so there was no error; alternatively, if they were in error they did not fall measurably below the performance ordinarily expected of fallible lawyers**

Even if it was a "major change," trial defense counsel discussed the withdrawal of the objection with Appellant, who agreed with doing so. As both trial defense counsels explained in their declarations, the wording change did not impact the defense theory that the government could not prove the possession of the child pornography was knowing. (Maj Hoxie Declaration, para. 5; Maj Johnson Declaration, para. 5; s*ee, e.g.,* R. at 251-52, 255-56 (defense arguments on findings).)

Additionally, trial defense counsel explained to Appellant that withdrawing the objection reduced his exposure to possible future prosecution because Double Jeopardy attached to a wider range of evidence. (Maj Hoxie Declaration, paras. 4, 8; Maj Johnson Declaration, paras. 4, 8.) That is, by agreeing to the deletion of "within his iCloud account," the government would then be precluded from bringing charges based on contraband found in other storage locations during the charged timeframe. (Maj Hoxie Declaration, para 6; Maj Johnson Declaration, para. 6.) It was reasonable for defense counsel to protect their client in such a manner.

Finally, even if the defense had maintained the objection and the military judge had sustained it, the government could have re-preferred and re-referred the charge and specification without the words "within his iCloud." This would have led to a potentially damaging delay for Appellant, because the defense was aware of incriminating evidence in the government's possession, the import of which they reasonably feared the government might have discovered if there was a delay in trial or a subsequent prosecution. (Maj Hoxie Declaration, para. 7; Maj Johnson Declaration, para. 7.)

Just because counsel *could have* maintained their objection, it does not mean that they *should have* done so in representing Appellant's best interests. Such sound strategy did not fall measurably below the performance ordinarily expected of lawyers, especially fallible ones.

**2. If the charging language had not been changed, Appellant would have been convicted, so there was no prejudice**

Had the term "within his iCloud account" remained in the charging language, Appellant still would have been convicted. The evidence at trial consistently demonstrate that all the charged child pornography came from within his iCloud account backup from his iPhone 6S. (R. at 49-51, 65-66, 80, 84-90, 118, 120-23, 126-30, 140, 160, 180, 183, 237-38, 256-57; Pros. Exs. 1-3, 5-8.) Therefore, even if the defense objection was maintained and even if it was granted, the result of the court-martial would not have been different.

Because trial defense counsel acted reasonably and with valid strategic reasons in withdrawing their objection to the change in the charge, and Appellant would have been convicted even if the initial defense objection had been granted, this Court should deny this assignment of error.

## III.

## APPELLANT'S RIGHT TO SPEEDY POST-TRIAL PROCESSING WAS NOT VIOLATED.

### *Additional Facts*

The record of trial (ROT) includes the court reporter's chronology. (ROT, Vol. 2, *Post Sentencing*.)

The United States has submitted, along with this Answer, a Motion to Attach the declarations, with attachments, provided by the Capt J-L.H., Director of Legal Operations, 18th Wing Legal Office (18 WG/JA), Kadena Law Center, Japan; and Maj K.B., the Chief of Military

Justice, 5th Air Force (5 AF/JA), Yokota Air Base, Japan. The chronologies cover every day from Appellant's 27 October 2022 sentencing to docketing with this Court.

The record of trial was docketed with this Court on 8 June 2023.

Appellant moved, opposed, for 12 enlargements of time to file his Assignments of Error from as early as 31 July 2023 until more than one year later, on 13 August 2024, when he ultimately filed it.

***Standard of Review***

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

***Law***

In Moreno, CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision more than 18 months after the case is docketed with the court. 63 M.J. 129, 142-143 (C.A.A.F. 2006). Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and in reviewing claims of unreasonable post-trial delay this Court evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S.

514, 530) (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

In Moreno, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138–39 (citations omitted). As to the first type of prejudice, where Appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. Id. at 139. Similarly, looking at the third type of prejudice, where Appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. Id. at 140. Finally, with regards to the second type of prejudice, anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." Id.

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). There must have been "unreasonable *and* unexplained post-trial delays." United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) (emphasis added). In such an instance, the appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including:

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

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

***Analysis***

Appellant claims he was denied speedy post-trial processing, and he requests relief in the form of downgrading his punitive discharge from a dishonorable discharge to a bad-conduct discharge. (App. Br.at 16.) Although the 244 days from Appellant's sentencing to docketing of the case with this Court is facially unreasonable delay, Appellant is not entitled to relief, because there are reasonable explanations for the delay, Appellant never asserted his right to speedy post-trial processing, he suffered no prejudice, and there is no adverse impact on the public's perception of the military justice system.

A. ***Length of the Delay***

This factor weighs in favor of Appellant. Although it is 94 days more than the 150-day benchmark set out in Livak, the length of time is not "egregious." Even though the delay is

presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief -- it merely triggers a due process analysis under Barker.

***B. Reasons for the Delay***

In discussing this second Livak factor, Appellant starts by focusing on the time from when the convening authority decision on action memorandum (CADAM) was complete and the court reporter certified the transcript, the latter of which was on 3 January 2023, until docketing with this Court. (App. Br. at 17.) However, the Moreno chronology and other information attached to the declarations from 18 WG/JA and 5 AF/JA – which are being submitted in the Motion to Attach filed along with this Answer -- provide detail for every day and demonstrates the government acted with reasonable diligence in processing Appellant's case post-trial. (*See* Declaration of Capt J-L. H., dated 15 October 2024; Declaration of Maj K.B, dated 15 October 2024.)

On 30 January 2023, after the legal office and case paralegal spent 15 workdays assembling the physical record of trial, 5 AF/JA directed them to restart by assembling the case as an electronic ROT; however, 5 AF/JA also required 18 WG/JA to assemble a physical ROT. (Declaration of Capt J-L. H., paras. 4, 5, and Chronology, p. 3.) After internal quality checks of the electronic ROT, it was served on Appellant on 22 March 2023. (Id., Chronology, p. 3.) Trial counsel received sealed exhibits on 30 March 2023, making the ROT complete. (Id.) Then, the legal office conducted their final ROT review, which completed on 7 April 2023, and they forwarded the ROT by mail to 5 AF/JA the next weekday. (Id.) On 9 May 2023, 18 WG/JA forwarded the ROT to JAJM, which received it on 31 May 2023 and then forwarded it to this Court on 8 June 2023. (Id.) The 22 days it took for the ROT to be sent from Japan to JAJM is within the usual range of time it takes for delivery. (Id., para. 6.)

Based on the declaration from the convening authority's legal office, 5 AF/JA, 18 days of their delay in reviewing the ROT was due to temporary duty of the then-Chief of Military Justice and/or NCOIC of Military Justice. (Declaration of Maj K.B., paras. 5-7.)

Reviewing post-trial processing under a wider lens, the court reporter's chronology and the base legal offices' chronologies demonstrate they were consistently working on the ROT until completed. The court reporter was also working simultaneously on another court-martial for a portion of the time, but she worked efficiently, front-loading some work and sending materials for review by the parties on a rolling basis. (Court Reporter Chronology, dated 4 January 2023.) The court reporter transcribed the arraignment prior to the start of trial. (Id.) The day after trial, she started working on the record of trial and, the very next business day she was at work, she started working on the transcription. (Id.) Also, the court report sent transcripts to counsel for review on a rolling basis, starting with the arraignment and first day of trial to counsel on 15 November 2022, less than 19 calendar days after Appellant's sentencing. (Id.) She sent the transcript of the second day of trial to counsel for review on 29 November 2022, and the third and final day of trial on 14 December 2022. (Id.) Thus, there is no evidence of a "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. To the contrary, there is demonstrable diligence and no apparent negligence, although the latter would still be considered "more neutral" and "weighed less heavily." Barker, 407 U.S. at 531. Any delays should be attributed to ordinary and reasonable timing based on the base legal office's workload rather than deliberate delay.

Appellant cites to one case in support for his position regarding this second Livak factor, United States v. Turpiano, No. ACM 38873 (f rev), 2019 CCA LEXIS 367 (A.F. Ct. Crim. App. 10 Sep. 2019) (unpub. op.). However, that case was before the Court on remand after the Court found prejudicial due process violations in post-trial processing, and the delays in the new post-

trial processing were because, among other reasons, the government failed to timely notify victims of their right to submit matters, improperly extended the deadline for said victims to submit matters, improperly *sua sponte* reached out to victims to check if they wanted to submit matters, failed to time serve the staff judge advocate recommendation on victims, failed to timely complete the Addendum and serve it on the appellant, and improperly sent the ROT to JAJM for review under Article 69(a), UCMJ, instead of to the Court for review under Article 66, UCMJ. Id. at *12-16. The Court noted the "unique circumstances of this case":

> Under normal circumstances, this 'small administrative error' [of routing the record to JAJM but not this Court] might be noted without further discussion. While this administrative error alone does not materially prejudice a substantial right of Appellant, the unique circumstances of this case elevate this error to a different level, and contributes to the specter of gross indifference or institutional neglect.

Because the unique circumstances of Turpiano distinguish it from other cases, and the court reporter and legal office in Appellant's case were reasonable and diligent, the second Livak factor weighs in favor of the United States.

### *C. Appellant Did not Assert Right to Timely Review*

Appellant concedes this factor favors the United States; however, he claims it should not weigh "heavily" against him. (App. Br. at 18.) The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. In this case, Appellant did not assert his right to speedy post-trial processing to the convening authority and only asserted the right in his assignments of error. Therefore, this factor weighs in the United States' favor.

**D. Appellant Suffered No Prejudice**

Although Appellant concedes he has suffered no impairment of the ability to present a defense at a rehearing, he claims he suffered oppressive incarceration pending appeal, as well as anxiety and concern. (Id.) However, his incarceration claim is just based on his serving the full extent of his sentence. (Id.) Appellant foreclosed the possibility that his 21-month term of imprisonment could be reviewed before fully serving the full term, because he filed 12 motions for enlargement of time. In any event, Appellant has raised no meritorious issues that could result in him receiving a reduced sentence of imprisonment.

As for "particularized anxiety or concern," Appellant only states, "As he told the court-martial, he wanted to kill himself when he was previously in confinement, and ensuring he remained confined by delaying the post-trial processing could only further this acute distress." (App. Br. at 19 (citing R. at 317).) However, he fails to proffer or allege any particularized anxiety or concern with this most recent trial and service of the sentence. In United States v. Dunbar, 31 M.J. 70 (C.M.A. 1990), our superior Court stated that a "general assertion" is insufficient to establish prejudice. Id. at 73 ("appellant made the general assertion that he has been denied two college scholarships because he had not received his DD Form 214, although he failed to support this claim in his affidavit by identifying the institutions or organizations sponsoring the scholarships.")

As a result, Appellant has failed to allege any valid claim of prejudice, so the Livak factors weigh heavily against Appellant.

**E. There is No Adverse Impact on the Public's Perception of the Military Justice System**

Finally, the delay is not "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362. Appellant does not cite to any cases in which the 150-day standard was exceeded by a similar

number of days as in Appellant's case and this Court granted relief. He cites United States v. Lampkins, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 (A.F. Ct. Crim. App. 2 Nov. 2023) (unpub. op.). However, in that case, this Court found 353 days from sentencing to docketing merited reducing the appellant's dishonorable discharge to a bad conduct discharge – but not impacting the sentence of confinement of 46 months, reduction to E-1, and a reprimand – noting the record of trial sat untouched in a cubicle at the base legal office for 77 days after the 150-day threshold had been passed. Id. at *12, 15. Appellant's case is distinguishable from Lampkins, because the length is drastically different, and because the legal office in Lampkins was negligent, whereas the legal office in Appellant's case moved post-trial processing forward diligently.

Even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity"); *see also* United States v. Byrne, No. ACM 40391, 2024 CCA LEXIS 346, *50 (A.F. Ct. Crim. App. 22 Aug. 2024) (unpub. op.) (finding delay of 290 days not egregious); United States v. Gardner, No. ACM 39929, 2021 CCA LEXIS 604, *70-74 (A.F. Ct. Crim. App. 16 Nov. 2021) (unpub. op.) (281 days).

Further, the delay in this case does not meet any of the non-exhaustive Gay factors. The post-trial processing times were not excessive, they were explained and justified, and appellant did not suffer prejudice. And the government did not act with bad faith or institutional neglect, so this Court should reject Appellant's assignment of error.

## IV.

**THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, AIR FORCE INSTRUCTION REQUIRED THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT TO ANNOTATE APPELLANT'S CRIMINAL INDEXING. FINALLY, 18 U.S.C. § 922 IS CONSTITUIONAL AS APPLIED TO APPELLANT.**

### *Additional Facts*

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and 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.)

Additionally, Appellant was previously convicted at a general court-martial of indecent recording, indecent broadcasting, and obstructing justice in March 2021. Pros. Ex. 12. Thus, his prior STR and EOJ also contained the firearms prohibition statement.

### *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" or "discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(1), (g)(6).

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him. (App. Br. at 22-27.) Appellant asserts that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

**A. This Court lacks jurisdiction to determine whether Appellant should be criminally indexed in accordance with 18 U.S.C. § 922.**

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. The Court of Appeals for the Armed Forces also recently held in United States v. Williams, __ M.J. __, 2024 CAAF LEXIS 501 (C.A.A.F. 5 Sep. 2024), that service courts of criminal appeals have no authority to act upon the portion of the statement of trial results that references the firearms prohibition. Id. at *12-15.

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

Even if this Court has jurisdiction to review this issue, Appellant was found guilty of Possession of Child Pornography, in violation of Article 134, UCMJ, which are crimes punishable by imprisonment for a term exceeding one year, that is, by 10 years of confinement. (MCM, pt. IV, para. 95.d(1) (2023 ed.); R. at 263.) Thus, the Staff Judge Advocate followed the appropriate

Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, dated 14 April 2022, paras. 29.30, 29.32.

**C. The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant and his Conviction for a Crime of Violence.**

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). "[T]he right was *never* thought to sweep indiscriminately." United States v. Rahimi, 602 U.S. _, 144 S. Ct. 1889, 1897, Docket No. 22-915, 2024 U.S. LEXIS 2714 (21 June 2024) (slip op.). The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added). Firearms prohibitions for felons are "presumptively lawful." Rahimi, 144 S. Ct. at 1902 (citing Heller, 554 U.S. at 626). Because Appellant has been convicted by a general court-martial of a serious crime, application of 18 U.S.C. 922(g) to him is constitutional.

Appellant's argument presumes, incorrectly, that his crime was not a violent offense or "crime of violence." (App. Br. at 23.) But Child Pornography is a "crime of violence." The Federal Bail Reform Act, 18 U.S.C. § 3156(a)(4)(C), defines the term "crime of violence" to include Distribution of Child Pornography; that is, a felony under Chapter 110 of the U.S. Code, including 18 U.S.C. § 2252A. Also, 18 U.S.C. § 3142, which governs the detention or release of

a defendant pending trial in Federal court, puts those charged with child pornography crimes squarely in the same class of dangerousness as those accused of drug trafficking, firearms offenses, and terrorism. *See* Section 3142(e)(3)(E) (establishing statutory presumption of danger to the community). Even if this Court considers Appellant not to be a physically violent offender, he is a danger to our society nonetheless. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) ("[The] use of children as … subjects of pornographic materials is very harmful to both the children and the society as a whole."). Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

Because Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review, the Court should deny the assignment of error.

## CONCLUSION

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 15 October 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| **UNITED STATES,**<br><br>*Appellee*,<br>v.<br><br>Airman Basic (E-1)<br>**IAN J.B. CADAVONA,**<br>United States Air Force,<br><br>*Appellant*. | **REPLY BRIEF ON BEHALF OF APPELLANT**<br><br>Before Panel No. 1<br><br>No. ACM 40476<br><br>22 October 2024 |

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

Appellant, Airman Basic (AB) Ian J.B. Cadavona, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Government's Answer, dated 15 October 2024 (Ans.). In addition to the arguments in his opening brief, filed on 13 August 2024, AB Cadavona submits the following additional arguments.

**I.**

**The Government's subsequent prosecution of an offense known before a previous court-martial constitutes plain error and prevented a military judge from determining whether Airman Basic Cadavona should serve his confinement sentences concurrently or consecutively.**

Trying AB Cadavona at separate courts-martial for offenses known at the same time had the effect of severing those offenses when it was not necessary to prevent manifest injustice. R.C.M. 906(b)(10)(A); Br. on Behalf of Appellant, 13 August 2024 at 3–10. The Government's Answer misstates the prejudice AB Cadavona suffered from this effective severance. AB Cadavona does not assume the military judge would have adjudged concurrent sentences to confinement if all known offenses had been tried in a single court-martial, as the Government incorrectly alleged. Ans. at 7. He recognizes that the military judge would have had the discretion to adjudge concurrent or consecutive sentences. Article 56(c)(2), Uniform Code of Military Justice

(UCMJ), 10 U.S.C. § 856(c)(2). The point, rather, is that the military judge would have made this decision, as required by the UCMJ. *Id.* By effectively severing the offenses, the Government took this decision away from the military judge and forced consecutive sentences to confinement. This deprived AB Cadavona of the opportunity to have a military judge decide whether his sentences would be served concurrently or consecutively, a decision given to the military judge by statute. That deprivation prejudiced AB Cadavona.

**WHEREFORE**, AB Cadavona respectfully requests that this Honorable Court set aside the findings of guilty and the sentence and dismiss the Charge and Specification with prejudice.

## II.

**Airman Basic Cadavona was denied effective assistance of counsel when his counsel withdrew the objection to a major change to the specification based on a misunderstanding of double jeopardy law.**

### 1. Keeping the iCloud language in the Specification would not have prevented the prohibitions against double jeopardy from barring further prosecution for the same offense following an acquittal.

The declarations of trial defense counsel, read in conjunction with the record, show that they withdrew the objection to the major change to the Specification based on a flawed understanding of double jeopardy. After the Defense initially objected to this change, the military judge asked trial defense counsel whether they agreed that if the language remained and AB Cadavona was acquitted, the government could recharge him without that language and it would not be double jeopardy. R. at 36. The Defense requested a recess to consider the matter raised by the military judge. R. at 36–37. After that recess, the Defense withdrew its objection, and the language was removed from the Specification. R. at 38. In their declarations, trial defense counsel confirmed that this concern about double jeopardy led to their decision because they believed allowing the change would "increase the likelihood that double jeopardy would fully

attach to the entirety of the evidence in the possession of the United States." Declaration of Maj SH, 17 September 2024 at 1; *see also* Declaration of Maj EJ, 20 September 2024 at 1.

The problem is that this view of double jeopardy is incorrect. The general test for deciding whether two offenses are the same for double jeopardy purposes is the one articulated by the United States Supreme Court in *Blockburger v. United States*: "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). This test generally applies to determining whether two offenses are the same for double jeopardy purposes in courts-martial. *United States v. Driskill*, 84 M.J. 248, 253 (C.A.A.F. 2024). Under the *Blockburger* test, the offenses in the charged Specification and in a new one without the iCloud language would be considered the same offense for double jeopardy purposes. The new one would be the same specification, only without the iCloud language, and require the government to prove all the same facts except that the knowing possession was within his iCloud account. Since the new specification would not require proof of anything that the old one did not, the two would be the same offense under the *Blockburger* test. *Driskill*, 84 M.J. at 252. Thus, the prohibitions against double jeopardy would bar the Government from recharging AB Cadavona in this manner. *Id.* Both the Government and trial defense counsel fail to acknowledge this. Neither the Answer nor trial defense counsel's declarations cite *Blockburger* when discussing double jeopardy considerations. *See* Ans. at 13; Declaration of Maj SH, 17 September 2024 at 1; Declaration of Maj EJ, 20 September 2024 at 1.

Even if the government added some additional fact to a new specification in an attempt to evade the *Blockburger* test, the reprosecution would be prevented by the prohibitions against double jeopardy. As the United States Court of Appeals for the Armed Forces (CAAF) has observed, "The Double Jeopardy Clause 'is a guarantee against being twice put to trial for the same

offense.'" *United States v. Rice*, 80 M.J. 36, 44 (C.A.A.F. 2020) (quoting *Abney v. United States*, 431 U.S. 651, 661 (1977)). "A successive prosecution is a distinct wrong because it forces an accused 'to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.'" *Id.* at 45 (quoting *Abney*, 431 U.S. at 661)). Although the *Blockburger* test generally applies in courts-martial, the CAAF has departed from it and found subsequent prosecutions barred by the prohibitions against double jeopardy in cases where a strict application of the test could produce a different result. *Driskill*, 84 M.J. at 256; *Rice*, 80 M.J. at 43–44. If the government recharged AB Cadavona with the same Article 134, UCMJ, 10 U.S.C. § 934, offense, it would require proving the same two elements: (1) that the accused knowingly and wrongfully possessed child pornography and (2) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. 2019 *MCM*, Part IV, ¶ 95(b)(1). While altering a detail would change the alleged facts of which AB Cadavona is on notice, it would not change the elements or the underlying alleged misconduct. Therefore, recharging him with a slightly altered specification would still subject him to "personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense," violating the prohibitions against double jeopardy. *Rice* 80 M.J. at 45.

**2. Trial defense counsel were ineffective because they withdraw their objection to changing the Specification based on an incorrect understanding of the law.**

The military judge's suggestion that keeping the phrase "in his iCloud account" in the Specification would eliminate the protections against double jeopardy and expose AB Cadavona to reprosecution following an acquittal was wrong. R. at 36. By applying the same reasoning, trial defense counsel acted based on a misunderstanding of the applicable law. Declaration of Maj SH, 17 September 2024 at 1; *see also* Declaration of Maj EJ, 20 September 2024 at 1. While it is unfortunate that a military judge's comment may have encouraged this misunderstanding, that

comment does not allow trial defense counsels' decision to escape the Supreme Court's holding that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam). When the Defense's objection to a major change to the Specification turned on the future application of the prohibitions against double jeopardy, trial defense counsel needed to ensure they sufficiently researched and understood the law around double jeopardy. A 15-minute recess was not adequate to develop the requisite knowledge and fully advise their client on the matter. R. at 37–38. Moreover, neither the record nor trial defense counsel's declarations describe any research conducted on this topic. *See* R. at 38; Declaration of Maj SH, 17 September 2024; Declaration of Maj EJ, 20 September 2024. Their decision to ultimately withdraw the objection based on this flawed premise confirms that trial defense counsel did not properly understand this point of law. This makes their performance unreasonable under *Hinton*. 571 U.S. 274.

The Government's other arguments as to why this decision does not constitute ineffective assistance of counsel are similarly unpersuasive. The Government asserted that prevailing on the objection could have led to a delay while the government re-preferred a new charge and specification, and such a delay would have been detrimental to AB Cadavona because the Government might have discovered additional incriminating evidence in its possession. Ans. at 13. The Government would not have had to withdraw and prefer a new charge because it could have gone forward and attempted to prove the Specification as referred. Prevailing on this objection would have forced the Government to choose between delaying the proceedings and moving forward with the existing Specification, but withdrawing the objection gave the Government an easy path to avoid this choice. Even if it did withdraw and reprefer a new charge,

that would have created new problems for the Government. In particular, the Government already had to amend the Specification to avoid violating the statute of limitations. R. at 34. Since the alleged misconduct was that close to being beyond to the statute of limitations, preferring a new charge would have greatly exacerbated the statute of limitations problem to AB Cadavona's benefit. Finally, the argument that the risk of a delay motivated trial defense counsel to withdraw the objection is undermined by the fact that they objected in the first place. They had every reason to know the Government could withdraw and prefer a new specification when they objected, but they only withdrew the objection after the military judge suggested the double jeopardy issue. R. at 38.

The Government's argument that the change in the Specification "did not impact the defense theory that the government could not prove the possession of the child pornography was knowing" similarly fails because the Defense could have pursued multiple avenues at once. Ans. at 13. "[D]eficient performance on a single issue may give rise to an ineffective assistance of counsel claim." *United States v. Palik*, 84 M.J. 284, 293 (C.A.A.F. 2024) (citing *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984)). Indeed, keeping the language in the Specification would have likely bolstered the Defense's argument because the Government would have had to prove knowing possession within the iCloud account, not just knowing possession generally. This undermines the Government's final argument that AB Cadavona would have been convicted anyway because of evidence that the charged contraband was in his iCloud account. Ans. at 14. If the language "within his iCloud account" remained, the Government would have had to prove AB Cadavona *knowingly* possessed the contraband material in his iCloud account, not just that it was there. Keeping this language would have buttressed the Defense's argument and made it more difficult overall for the Government to meet its burden, reducing the probability that AB Cadavona

would have been convicted.

Trial defense counsel's decision to withdraw an objection to a major change in the Specification was primarily premised on a flawed understanding of double jeopardy law. Although the military judge may have misled trial defense counsel, it was ultimately counsel's responsibility to fully research, understand, and apply what became an important point of law. Failing to do so, and easing the Government's path to obtain a conviction, harmed AB Cadavona and constitutes ineffective assistance of counsel.

**WHEREFORE**, AB Cadavona respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

## III.

**The 224-day post-trial processing period warrants relief because the Government's explanations for the delay show only a failure to prioritize the preparation of Airman Basic Cadavona's record of trial and his right to timely post-trial processing.**

The 224-day delay from sentencing to docketing is facially unreasonable under *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), and the Government's explanation does not overcome the facial unreasonableness. The Government points to two declarations that purportedly detail the process of completing post-trial processing of AB Cadavona's record. Ans. at 18 (citing Declaration of Capt JLH, 15 October 2024; Declaration of Maj KB, 15 October 2024).[1] Contrary to the Government's argument, these declarations do not show the Government acted with reasonable diligence. *Id.* Rather, they show consistent delays resulting from Government decisions and a failure to prioritize AB Cadavona's right to timely post-trial processing.

[1] While the motion to attach these declarations remains pending before this Court, AB Cadavona is not opposing this motion. United States' Motion to Attach Declarations, 15 October 2024.

The Government first highlighted a change directed by the General Court-Martial Convening Authority's legal office (5 AF/JA) as a reason for the delay. Ans. at 18; Declaration of Capt JLH, 15 October 2024 at 1. The local legal office seemingly began preparing a physical record of trial (ROT) before 5 AF/JA instructed the local legal office "to transition and assemble an electronic ROT" in addition to the physical ROT. Declaration of Capt JLH, 15 October 2024 at 1; Ans. at 18. The chronology attached to Capt JLH's declaration indicates this new direction came between 95 and 99 days after sentencing—after almost two-thirds of the 150-day standard had already passed. Declaration of Capt JLH, 15 October 2024, Chronology at 3; *Livak*, 80 M.J. at 633 (stating a 150-day standard applies to determine whether post-trial processing delays are facially unreasonable). The Government chose to direct production of a second ROT in a different format, and this choice obviously increased the amount of work and time needed to fulfill 5 AF/JA's new requirement. Making this direction when a majority of the 150-day post-trial processing timeline had already passed exacerbated the effects of the additional requirement, but these exacerbated effects were again the result of a Government decision. The United States cannot avoid the effects on the post-trial processing timeline by arguing that a new requirement from 5 AF/JA—an arm of the Government—took more time to fulfill.

The local legal office did not even forward the ROT to 5 AF/JA for review until 10 April 2023, 15 days after the 150-day timeline expired on 26 March 2023. Declaration of Capt JLH, 15 October 2024, Chronology at 3; Ans. at 18. Despite receiving a ROT for a case that already had a facially unreasonable post-trial processing period, the Government's own attachment shows 5 AF/JA did not complete its review of this ROT until 4 May 2023, 24 days after the local legal office forwarded it. Declaration of Maj KB, 15 October 2024. The Government attempted to justify this delay in reviewing the ROT by noting that both the Chief and Noncommissioned

Officer in Charge of Military Justice at 5 AF/JA performed temporary duties during this delay. Ans. at 19 (citing declaration of Maj KB, 15 October 2024). These other, conflicting duties were not inevitable. The Government chose to assign these personnel to temporary duties, prioritizing those duties over post-trial processing in a case that had already exceeded the established standard for timely post-trial processing. The United States must be held accountable for decisions that caused this ROT to sit idle while AB Cadavona sat in confinement and the violation of the well-known standard for timely post-trial processing continued to grow.

Once 5 AF/JA ultimately completed its review, the ROT went back to the local legal office, where personnel mailed it to an office in the United States. It then took 22 days for the ROT to reach this office. Declaration of Capt JLH, 15 October 2024, Chronology at 4. The Government attempted to explain this delay away by arguing it is "within the usual range of time it takes for delivery" of a ROT sent from Japan. Ans. at 18 (citing Declaration of Capt JLH, 15 October 2024 at 2). But the fact that this is a typical timeline for delivery from Japan to the United States simply means the Government failed to account for the known time requirement. The Government has an obligation to timely complete post-trial processing, so it needed to prepare, review, and mail the ROT while leaving sufficient time for a delivery it seemingly expected would take weeks. Instead, the Government did not even mail the ROT until well after the 150-day standard had passed, tacking a known long delivery time onto an already excessive period of post-trial delay. The fact that a delay is typical does not excuse it; it necessitates anticipating it and accounting for it when planning to meet timely post-trial processing obligations. The Government failed to do this.

The Government's own explanations show that the facially unreasonable post-trial processing time resulted from the Government's decisions that prioritized other matters over

timely post-trial processing and failed to account for its post-trial obligations. These explanations do not even account for the entire delay. The provided chronology records 29 non-holiday weekdays—almost an entire month of working days—as simply "no update." Declaration of Capt JLH, 15 October 2024, Chronology at 1, 3–4. Between decisions that delayed post-trial processing and delays without explanation, it is clear the Government did not act with "demonstrable diligence and no apparent negligence," as the Government unpersuasively claimed. Ans. at 19.

The reasons for the delay strongly favor AB Cadavona, as do the length of the delay and prejudice. Br. on Behalf of Appellant at 17–19. Moreover, this Court can still grant relief even in the absence of prejudice or a due process violation. *Id.* at 19–21. The Government challenged this by asserting, with almost no further explanation or argument, that AB Cadavona's case does not meet any of the factors in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). Ans. at 22. As AB Cadavona's opening brief explains, an analysis of the *Gay* factors supports granting relief. Br. on Behalf of Appellant at 20–21. AB Cadavona's case is yet another example of the "institutional neglect" of timely post-trial processing recently noted by this Court. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. Jun. 7, 2024). Consequently, the Court should grant meaningful relief for the 224-day post-trial processing period brought about by Government choices and neglect.

**WHEREFORE**, AB Cadavona respectfully requests that this Honorable Court affirm only so much of the sentence that includes a reprimand, confinement for 21 months, and a bad-conduct discharge.

## IV.

**As applied to Airman Basic Cadavona, 18 U.S.C. § 922 is unconstitutional because the Government cannot demonstrate that barring his possession of firearms is consistent with the nation's historical tradition of firearm regulation when he stands convicted of a nonviolent offense.**

On 5 September 2024, after AB Cadavona filed his opening brief, the United States Court of Appeals for the Armed Forces (CAAF) issued *United States v. Williams*, where the CAAF considered whether the Army Court of Criminal Appeals (Army Court) had the authority to alter the military judge's correction to the Statement of Trial Results (STR), which is incorporated into the judgment of the court signed by the military judge. *Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *1-3. In *Williams*, the military judge had erroneously marked on the STR that the appellant's conviction triggered the Lautenberg Amendment, 18 U.S.C. § 922(g), after advising the appellant of the opposite during his guilty plea. *Id*. at *1-2. Later, in promulgating the judgment, the military judge incorporated and amended the original STR to correct the firearms ban so that 18 U.S.C. § 922(g) was not triggered. *Id*. at *6. On appeal, the Army Court changed the firearm bar on the STR *back*, to reindicate the appellant was barred from possessing a firearm. *Id*.

The CAAF determined that changing the STR back was an ultra vires act by the Army Court because "the STR is not part of the findings or sentence," but rather "other information" required by R.C.M. 1101(a)(6). *Id*. at *12-13. Therefore, the Army Court did not have authority to act pursuant to Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018),[2] in this way. *Id*.

The CAAF then analyzed whether the Army Court had the authority to change the firearm ban under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), as an "error . . . in the processing of the

[2] The language at issue in Article 66, UCMJ, is not substantively different between the 2018 version analyzed in *Williams* and the version applicable to AB Cadavona's appeal.

court-martial after the judgment was entered into the record." *Id*. at *13. The CAAF concluded that Article 66(d)(2) did not apply for three reasons related to the unique facts of that case. *Id*. at *14-15. First, there was no "error" because the military judge corrected any erroneous notation on the STR before signing the judgment. *Id*. at *14. Thus, by the plain language of the statute, there was no error to consider after the entry of judgment. Second, assuming error, the burden of raising such error was on the accused. *Id*. As the appellant in *Williams* agreed with the military judge's action in correcting the firearm notation, no error was raised. *Id*. Therefore, the Army Court's "correction authority" had not been "triggered," as the appellant never raised the firearm notation as an error. Third, assuming error and assuming the error had been raised, the timing of the military judge's erroneous notation preceded the entry of judgment; it was on the STR. *Id*. Therefore, based on the plain language of Article 66(d)(2), UCMJ, it was not an error occurring *after* the entry of judgment. *Id.*

The CAAF did not foreclose properly 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 AB Cadavona's case.[3] Unlike the appellant in *Williams*, AB Cadavona meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ.

First, AB Cadavona "demonstrated error" in his case—that he was erroneously and unconstitutionally deprived of his right to bear arms—in his initial brief to this Court. Br. on

[3] The statutory authority for this Court to act may differ from the authority of the CAAF to address this issue under Article 67, 10 U.S.C. § 867, a question which may be resolved by the CAAF in *United States v. Johnson*, No. ACM 40257, USCA Dkt. No. 24-0004/SF, 84 M.J. 343 (C.A.A.F. Mar. 29, 2024), *vacated and review of other issues granted*, ___M.J. ___ (C.A.A.F. Sep. 24, 2024) (the CAAF granted review of this case and later vacated its initial order and granted review of different issues). The military judge's inclusion of the STR and its First Indorsement—and the firearms prohibition therein—into the EOJ is a "decision, judgment, or order" that was "incorrect in law."

Behalf of Appellant at 22–27. In demonstrating this error, AB Cadavona asked for correction of the EOJ, which included the First Indorsement with the erroneous firearm bar. *Id*. at 27. This requested remedy is in line with *Williams*. While this Court cannot correct the erroneous firearms bar associated with the STR, it *can* correct the erroneous firearm notation on the First Indorsement attached to the EOJ, which was completed *after* the entry of judgment during post-trial processing. *Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *14-15; *see also infra* (discussing timing in detail). The facts and issue presented in AB Cadavona's case have not changed. Instead, AB Cadavona is asserting a different basis for jurisdiction and relief based on a change in the law that occurred after he filed his initial brief and that the Government cited in its Answer. Ans. at 24. Unlike the appellant in *Williams*, there is an error raised and demonstrated by AB Cadavona for this Court to consider under Article 66(d)(2), UCMJ.

Second, the error on the First Indorsement erroneously depriving AB Cadavona 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*. Additionally, as this First Indorsement is the most recent notification to law enforcement entities about the applicability of 18 U.S.C. § 922 to AB Cadavona, it makes sense that this is the document the Court should review for post-

trial processing error. *See id*. at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ and attachments). Therefore, unlike the issue addressed in *Williams*, the error here occurred after the entry of judgment, in accordance with the last triggering criterion under Article 66(d)(2), UCMJ.

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 501, at *11-13. However, AB Cadavona 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 Indorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects AB Cadavona's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

**WHEREFORE**, AB Cadavona respectfully requests that this Honorable Court hold 10 U.S.C. § 922 is unconstitutional as applied to him and order correction of the first indorsement to the entry of judgment, pursuant to its authority under Article 66(d)(2), UCMJ.

Respectfully submitted,

[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 October 2024.

Respectfully submitted,

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,* | ) | UNITED STATES' MOTION<br>TO ATTACH DECLARATIONS |
| v. | ) | No. ACM 40476 |
| Airman Basic (E-1)<br>**IAN J.B. CADAVONA**, USAF,<br>*Appellant.* | ) | Before Panel No. 1<br><br>15 October 2024 |

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States hereby submits this Motion to Attach Declarations with post-trial processing information to address Appellant's claim in Issue III in his Assignments of Error.

In Issue III, Appellant claims he was denied speedy post-trial processing and is entitled to relief for an alleged violation of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). (App. Br. at 15-21.) He repeatedly calls the delay "unexplained," because the record does not include a chronology of post-trial processing steps taken. (App. Br. at 15, 16, 18.)

The Court of Appeals for the Armed Forces held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that, "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). The issue of post-trial delay is raised by materials currently in the record but is not "fully resolvable by those materials." Jessie, 79 M.J. at 445.

The Declarations from the base legal office and the convening authority's servicing legal office contain chronological information that addresses the post-trial processing of Appellant's

case from sentencing to docketing with this Court, so it is relevant and necessary to resolve and disprove Appellant's claim that the United States deprived him of speedy post-trial processing.

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 15 October 2024 via electronic filing.

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