IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A)**
v.	)	
	)	
Senior Airman (E-4)	)	No. ACM _____
JOSIAH M. CASWELL	)	
United States Air Force	)	14 June 2023
Appellant	)	

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

On 31 January 2023, a military judge sitting at a special court-martial convicted Senior Airman (SrA) Caswell, against his pleas, of one specification and one charge of unlawfully carrying a concealed firearm, in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914 (2019) and one specification and one charge of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915 (2019).[1] Record of Trial (ROT), Vol. 1, *Entry of Judgment*, dated 20 February 2023. The Military Judge sentenced SrA Caswell to 31 days confinement, reduction to the grade of E-1, to be reprimanded. *Id.*

[1] SrA Caswell was acquitted of one specification of communicating a threat.

On 23 March 2023, the Government sent SrA Caswell the required notice by mail of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A) (2022), SrA Caswell files his notice of direct appeal with this Court.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23035**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Josiah M. CASWELL	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 14 June 2023. On 27 June 2023, the record of trial was received by the Military Appellate Records Branch.

Accordingly, it is by the court on this 27th day of June, 2023,

ORDERED:

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

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	17 August 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 **25 October 2023**. The record of trial was docketed with this Court on 27 June 2023. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

GRANTED
18 Aug 2023

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 Division on 17 August 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

18 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 Panel No. 1

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

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

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

[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 18 August 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Senior Airmen (E-4) **JOSIAH M. CASWELL** United States Air Force *Appellant.*	)	No. ACM 23035
	)	12 September 2023

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

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

A. **Appendix A – Court Reporter Chronology - *United States v. Senior Airman Josiah M. Caswell*, 11 September 2023 (3 pages)**

B. **Appendix B – Record of Trial Indexes - *United States v. Senior Airman Josiah M. Caswell*, undated (7 pages)**

C. **Appendix C – Special Court-Martial Certified Verbatim Transcript - *United States v. Senior Airman Josiah M. Caswell*, dated 30 January 2023 (221 pages)**

On 14 June 2023, Appellant, through Appellate Defense Counsel, filed his notice of direct appeal pursuant to Article 66(b)(1)(A) with this Court. (*Notice of Direct Appeal Pursuant to Article 66(b)(1)(a)*, dated 14 June 2023.) In the interest of justice and for this Court and all counsel involved to complete meaningful appellate review, the United States is filing this motion to attach the above listed appendices. *See* United States v. Credit, 4 M.J. 118, 119 (C.M.A. 1977) (explaining that "a tri indeed, the very heart of the criminal proceedings and the single element es eaningful appellate review…).

GRANTED
20 SEP 2023

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

[redacted]
VANESSA BAIROS, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 September 2023.

VANESSA BAIROS, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	18 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 second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 November 2023**. The record of trial was docketed with this Court on 27 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 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied [illegible]s deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 [illegible]023.

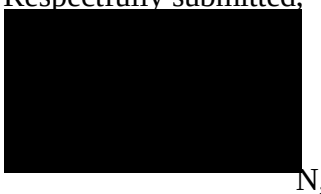
GRANTED
18 Oct 2023

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 18 October 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

18 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 Panel No. 1

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

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

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

[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 18 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, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	17 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 December 2023**. The record of trial was docketed with this Court on 27 June 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 [illegible].

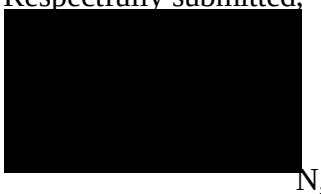
GRANTED
21 NOV 2023

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

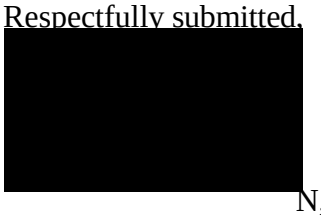


N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 17 November 2023.

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

20 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 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 20 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	15 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 his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 January 2024**. The record of trial was docketed with this Court on 27 June 2023. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 023.

GRANTED
20 DEC 2023

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOEs before this Court. Counsel has two pending CAAF petitions and supplements. Counsel is also starting leave as of the date of this filing until 28 December 2023. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Nine Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has reviewed the allied papers, all unsealed exhibits, and is nearly halfway through the transcript.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128

Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

4. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not started his review of this case.

5. *United States v. Ellis*, No. ACM 40430 – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.[1] R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id.*; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten

[1] Various charges and specifications were withdrawn and dismissed with prejudice.

defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet started his review of this case.

6. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

7. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

8. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

9. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1,

Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 15 December 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

19 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 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]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	16 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 his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 February 2024**. The record of trial was docketed with this Court on 27 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 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 023.

GRANTED
18 JAN 2024

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOEs before this Court. Counsel has four pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Nine Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Except for sealed materials, Counsel has finished his review of this case. Counsel filed a motion to view sealed materials on 3 January 2024 which was granted. In his last EOT motion on 3 January 2024, which was also granted, Counsel forecasted to this Court that he does not anticipate needing another EOT unless unforeseen circumstances arise.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits.

The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

4. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not started his review of this case.

5. *United States v. Ellis*, No. ACM 40430 – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.[1] R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id*.; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on

[1] Various charges and specifications were withdrawn and dismissed with prejudice.

Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet started his review of this case.

6. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

7. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three

prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

8. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

9. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for

six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 16 January 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

18 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 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]

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 18 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	14 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 his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 March 2024**. The record of trial was docketed with this Court on 27 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 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023.

GRANTED
14 FEB 2024

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Counsel has one pending Supreme Court Reply Brief (Answer due to Court and Counsel on 20 February 2024) and four pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Eight Air Force Court cases have priority over the present case:

1. *United States v. Ellis*, No. ACM 40430[1] – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.[2] R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id*.; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten

[1] On 29 January 2024, this Court (Panel 1) approved Appellant's request for EOT 9. Without prior notice and without any status conferences, this Court said, "Given the nature of the case and the number of enlargements granted thus far, the court is not willing to grant any further enlargements of time absent exceptional circumstances." As such, Counsel has changed the prioritization of this guilty plea case over the two cases docketed before this case.

[2] Various charges and specifications were withdrawn and dismissed with prejudice.

defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has reviewed the prosecution, defense, appellate, and court exhibits; and the allied papers. His next task is to review the transcript of proceedings.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency

submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

4. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not started his review of this case.

5. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority

took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

6. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

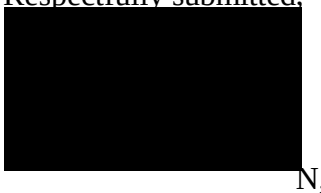
7. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action,

dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

8. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
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 Division on 14 February 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

14 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 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]

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 14 February 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	13 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 his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 April 2024**. The record of trial was docketed with this Court on 27 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 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023.

GRANTED
15 MAR 2024

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 22 cases; 11 cases are pending initial AOEs before this Court. Counsel has three pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Seven Air Force Court cases have priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has reviewed the charging documents (ROT Vol. 1) and all unsealed exhibits (ROT Vols. 2-5).

2. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

3. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is not confined. Counsel has not started his review of this case.

4. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted

Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

5. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

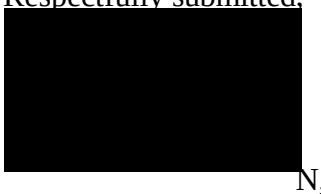
6. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one

specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

7. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 13 March 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

14 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

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 14 March 2024.

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 23035**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Josiah M. CASWELL	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 12 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 16th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED, IN PART**. Appellant shall file any assignments of error not later than **17 May 2024**.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	12 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 his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 May 2024**. The record of trial was docketed with this Court on 27 June 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied Appellant's deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 February 2023.

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 21 cases; 10 cases are pending initial AOEs before this Court. Counsel has two pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Seven Air Force Court cases have priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has reviewed all exhibits, excluding sealed materials, and is nearly finished reviewing the 1,448-page transcript.

2. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined. Counsel has not yet started his review of this case.

3. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is not confined. Counsel has not started his review of this case.

4. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted

Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has not yet started his review of this case.

5. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of the case.

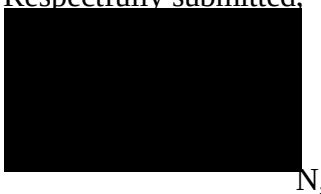
6. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one

specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

7. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 12 April 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

15 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

[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 15 April 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	8 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 his ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 June 2024**. The record of trial was docketed with this Court on 27 June 2023. From the date of docketing to the present date, 316 days have elapsed. On the date requested, 355 days will have elapsed.

On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied deferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 [illegible]023.

GRANTED
10 MAY 2024

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 20 cases; 10 cases are pending initial AOEs before this Court. Counsel has one pending CAAF Supplement due in late May. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Seven Air Force Court cases have priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has finished drafting the AOE, is currently editing, and is working with the client on *Grostefon* matters. Counsel intends to file the AOE on Monday, 13 May.

2. *United States v. Van Velson*, No. ACM 40401 – On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, UCMJ. R. at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. ROT, Vol. 1, Convening Authority Decision on Action, 21 November 2022. The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is not confined. Counsel has reviewed the entire record and is drafting the AOE. Barring unforeseen circumstances, Counsel intends to file the AOE on or before the current deadline of 26 May 2024.

3. *United States v. Wood*, No. ACM 40429 – On 18 October 2022, consistent with his pleas, a Military Judge in a general court-martial, at Barksdale Air Force Base, LA, convicted Appellant of one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 120. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. R. at 155. The Convening Authority took no action on the findings, no action on the sentence, but approved Appellant's request for waiver of automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 17 November 2022. The ROT consists of eight volumes, four prosecution exhibits, five defense exhibits, 34 appellate exhibits, and two court exhibits. Appellant is not confined. Counsel has not started his review of this case.

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6. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted

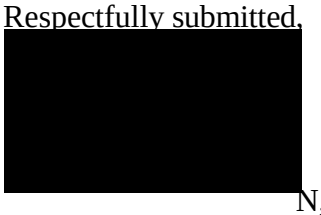
Appellant of one charge, four specifications of wrongful possession and introduction of Schedule I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has not yet started his review of this case.

7. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes,

three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
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(240) 612-4773

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 Division on 8 May 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

10 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 355 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 10 May 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4), **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035
	)	4 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 his tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 July 2024**. The record of trial was docketed with this Court on 27 June 2023. From the date of docketing to the present date, 343 days have elapsed. On the date requested, 385 days will have elapsed.

On 31 January 2023, contrary to his pleas, a Military Judge sitting at a special court-martial at Seymour Johnson Air Force Base, NC, convicted Appellant of one charge, one specification of unlawfully carrying a firearm in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914; and one charge, one specification of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. R. at 172. The Military Judge sentenced Appellant to be reprimanded, to be confined for 31 days, and to be reduced to the rank of E-1. R. at 218. The Convening Authority took no action on the findings, no action on the sentence, and denied [illegible]eferment request. ROT, Vol. 1, Convening Authority Decision on Action, 13 Fe[illegible]23.

GRANTED
7 JUN 2024

The ROT consists of three volumes, three prosecution exhibits, 11 defense exhibits, 21 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellate counsel is currently assigned 20 cases; seven cases are pending initial AOEs before this Court. Counsel has no pending CAAF supplements or petitions. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. That is, Counsel's caseload has prevented him from reaching and finishing Appellant's case sooner. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

Since his last extension of time, Counsel has:

1. Drafted and filed an eight-issue, 50-page AOE in *United States v. Serjak*, No. ACM 40392

2. Reviewed, drafted, and filed a four-issue, 16-page AOE in *United States v. Van Velson*, No. ACM 40401

3. Reviewed, drafted, and filed a Merits Brief with one *Grostefon* issue in *United States v. Wood*, No. ACM 40429

4. Drafted a two-issue, 30-page CAAF Supplement in *United States v. Aguirre*, No. 24-0146/AF, 2024 CAAF LEXIS 263 (C.A.A.F. May 9, 2024) for submission on 29 May 2024

5. Reviewed the entire record in *United States v. Block*, No. ACM 40466 (except for sealed materials as explained below)

6. Reviewed the entire record in *United States v. Hollenback*, No. ACM 40481

7. Prepared for and participated in two moots as a judge

Four Air Force Court cases have priority over the present case:

1. *United States v. Block*, No. ACM 40466 – On 28 February 2023, consistent with his pleas, a Military Judge sitting at a general court-martial, at Hill Air Force Base, Utah, convicted Appellant of one charge, one specification of obstruction of justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one charge, two specifications of possessing and viewing child

pornography, in violation of Article 134, UCMJ, 10 U.S.C. 934. R. at 67. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 24 months, and to be dishonorably discharged. R. at 93. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 21 March 2023. The ROT consists of three volumes, three prosecution exhibits, 19 defense exhibits, and nine appellate exhibits. The Appellant is currently confined. Counsel has reviewed the entire case file and attempted to review sealed materials on 3 June 2024. However, the sealed materials were password protected and neither this Court nor JAJM had the password. But for reviewing the sealed materials, Counsel has finished this case.

2. *United States v. Hollenback*, No. ACM 40481 – On 31 January 2023, consistent with his pleas, a Military Judge sitting at a general court-martial at Minot, Air Force Base, North Dakota, convicted Appellant of one charge, two specifications of possessing and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 105. The Military Judge sentenced Appellant to be confined for three years and to be dismissed from the Air Force. R. at 134. The Convening Authority took no action on the findings, took no action on the sentence, and approved Appellant's request for a waiver of all automatic forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 16 March 2023. The ROT consists of two volumes, three prosecution exhibits, three defense exhibits, and nine appellate exhibits. Appellant is not confined. Counsel has reviewed the entire case file, including sealed materials. Counsel is working the AOE.

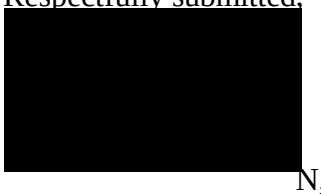
3. *United States v. Lawson*, No. ACM 23034 – On 3 February 2023, contrary to his pleas, members sitting at a special court-martial at Little Rock Air Force Base, Arkansas, convicted Appellant of one charge, four specifications of wrongful possession and introduction of Schedule

I controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge, one specification of unlawful entry in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one charge, one specification disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 174, 204. The members sentenced Appellant to be reduced to the grade of E-1, to forfeit $200 pay per month for 12 months, and to be confined for two months. R. at 202. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 23 February 2023. The ROT consists of three volumes, 13 prosecution exhibits, six defense exhibits, and 45 appellate exhibits. Appellant is not confined. Counsel has reviewed the entire record of trial and has reviewed one quarter of the transcript of proceedings.

4. *United States v. Scott*, No. ACM 40369 – On 8 June 2022, pursuant to a plea agreement, enlisted members in a general court-martial at Davis-Monthan, Air Force Base, Arizona, convicted Appellant of one charge, one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one charge, two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one additional charge, one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 32. Members sentenced Appellant to be reduced to the grade of E-5, to forfeit all pay and allowances, and to be confined for 180 days. R. at 90. The Convening Authority took no action on the findings of the case, but took the following actions on the sentence: 1) reduced the forfeiture of all pay and allowances to forfeiture of $3,704.00 pay for six months; 2) deferred the reduction in rank until the Military Judge signed the Entry of Judgment; and 3) denied appellant's request for deferment of all adjudged forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, dated 28 June 2022. The ROT consists of four volumes, three prosecution exhibits, 25 defense exhibits, 11 appellate exhibits, and one court exhibit. Appellant is not confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

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 Division on 4 June 2024.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4773

6 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOSIAH M. CASWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23035 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 385 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 June 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	)	**NOTICE OF APPEARANCE OF COUNSEL**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 23035
JOSIAH M. CASWELL	)	
United States Air Force	)	25 June 2024
Appellant.	)	

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

COMES NOW, Maj Nicole J. Herbers, pursuant to Rule 12(a) of this Honorable Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. Maj Herbers is assigned to the Appellate Defense Division and her contact information is in the signature block below.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, STE 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@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 25 June 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO WITHDRAW AS APPELLATE DEFENSE COUNSEL**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 23035
JOSIAH M. CASWELL	)	
United States Air Force	)	25 June 2024
Appellant.	)	

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in this case. Major Nicole Herbers has been detailed as counsel and a thorough turnover with undersigned counsel has been completed. Appellant has been advised of this motion and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following this Court's action on it.

Undersigned counsel is PCA'ing at the end of July 2024 and will not be able to review Appellant's case before his departure. Prior to his departure, undersigned counsel must complete two CAAF Grant Briefs, one Assignment of Error for a case before this Court, and counsel will be taking a week's leave at the end of July prior to his departure. To date, undersigned counsel has not reviewed the record in the case which is his second priority among his Air Force Court cases. In light of undersigned's counsel caseload and his PCA, a release of counsel is in Appellant's best interest and will expedite review of his case.

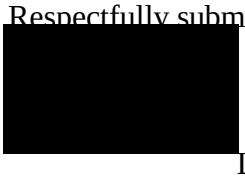
j Herbers has already completed reviewing the transcript and will be filing her notice
nce in accordance with Rule 12.4.

GRANTED

8 JULY 2024

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

Respectfully submitted,



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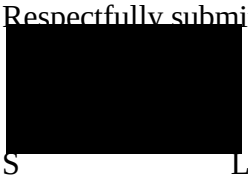
CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



S LSON, Maj, USAF
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Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	No. ACM 23035 16 July 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER ARTICLE 114, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO SENIOR AIRMAN CASWELL.

II.

WHETHER SENIOR AIRMAN CASWELL'S CONVICTION FOR CARRYING A CONCEALED WEAPON IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER SENIOR AIRMAN CASWELL'S CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY AND FACTUALLY SUFFICIENT.

STATEMENT OF THE CASE

On 31 January 2023, at Seymour Johnson Air Force Base, North Carolina, a special court-martial composed of a military judge alone found Senior Airman (SrA) Josiah M. Caswell guilty, contrary to his pleas, of Charge I and the specification for unlawfully carrying a concealed weapon in violation of Article 114, Uniform Code of

Military Justice (UCMJ), 10 U.S.C. § 914,[1] and of specification 1 of Charge II for communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. §915. R. at 172; Entry of Judgment (EOJ), 20 February 2023.[2] The military judge sentenced SrA Caswell to be reduced to the grade of E-1, to be reprimanded, and to concurrent terms of confinement in the amount of: 7 days for the specification of Charge I and 31 days for specification 1 of Charge II. R. at 218; EOJ. The convening authority took no action on the findings or sentence and disapproved SrA Caswell's request for deferment in the reduction in grade. Convening Authority Decision on Action, 13 February 2023.

On 23 March 2023, SrA Caswell was notified of his right to submit a Direct Appeal. Notice of Right to Submit Direct Appeal, 23 March 2023. On 14 June 2023, SrA Caswell submitted his notice to this Court, and the Court docketed his case on 27 June 2023. Notice of Docketing, 27 June 2023. On 20 September 2023, this Court granted the Government's motion to attach the certified verbatim transcript and accompanying documents.

STATEMENT OF FACTS

The charges and specifications stem from an evening out at a bar near Seymour Johnson Air Force Base in North Carolina, where SrA Caswell met up with friends and coworkers. J.N. was the primary witness against SrA Caswell and the recipient of the charged threat. R. at 51. J.N. went to the bar with his friend, SrA J.I. R. at

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).
[2] SrA Caswell was acquitted of specification two of Charge II. *Id.*

53. While J.N. did not really know SrA Caswell, SrA J.I. and SrA Caswell had known each other from their previous assignment. R. at 83.

At the bar, J.N. and SrA J.I. were sitting outside together. R. at 53. Close to midnight, SrA Caswell joined J.N. and SrA J.I. outside. R. at 54. When SrA Caswell arrived, J.N. started making fun of SrA Caswell for his choice of drink, and the insults between the two became personal. *Id.* Although J.N. made fun of SrA Caswell's wife, when SrA Caswell returned the barb directed toward J.N.'s girlfriend, J.N. transformed the banter into something more serious. R. at 55, 66-68. In response to J.N.'s escalation, SrA Caswell asked J.N., "Do you think you could take me?" or "What are you going to do about it?" R. at 55. J.N. responded "My girlfriend could take you," and then SrA Caswell asked again, "Do you think YOU could take me?" *Id.* As SrA Caswell asked the question again, he proceeded to lift the bottom of his shirt, displaying a firearm. *Id.* J.N. testified that as SrA Caswell continued to display the firearm, SrA Caswell asked, "Are we going to do this or what?" or "So what are we going to do?" and then SrA Caswell moved to sit on J.N.'s right side, approximately 2 feet away. *Id.* This language comprises the threat against J.N. *See* DD Form 458, *Charge Sheet*; R. at 209.

While SrA Caswell was seated, the firearm was showing, and SrA Caswell asked, "So are we still gonna do this?" "What are you trying to do?" and "Are we still gonna do this?" R. at 57. J.N. responded with something like, "That's a cute little gun you have there." *Id.*

Even though SrA J.I. was present outside with J.N. and SrA Caswell at the time of their exchange, SrA J.I. testified he did not really pay attention to what they were saying or doing until he heard what he described as a metal sound that was like a chambering of a round. R. at 87-88. He did not describe seeing a weapon. *Id.* at 87-89.

After the presentencing hearing and the Government's sentencing argument, the military judge entered special findings. R. at 207. The military judge made special findings as to the elements of Charge II, specification 1. *Id.* The court found beyond a reasonable doubt that, on or about 21 August 2022, at or near Seven Springs, North Carolina, the accused communicated certain language, to wit: "try me" and "Are we going to do this," or words to that effect, expressing a present determination or intent to injure the person, property, or reputation of J.N., presently or in the future; two, that the communication was made known to J.N.; and three, that the communication was wrongful. R. at 208. Based on both parties' agreement, the military judge also found a fourth element was met, "while displaying a weapon, to wit: a firearm." *Id.*

To support the conclusion the elements had been met beyond a reasonable doubt, the military judge cited the following facts: J.N. testified SrA Caswell said, "Do you think you could take me?" and "What are you going to do about it?" and J.N. responded with, "No, my girlfriend can kick your ass" or words to that effect. R. at 209. The judge next cited that the accused lifted the bottom of his shirt, J.N. saw the firearm, and while displaying it, SrA Caswell said, "Are we gonna do this or what?"

or "What are we doing? What are we going to do[?]" or words to that effect. *Id.* Ultimately, the military judge found self-defense, that is excessive force to deter, did not apply to Specification 1 as it applies to Specification 2, which was not covered by special findings given the finding of not guilty. R. at 210. The act of chambering a round and the threat charged in specification 2 were not part of the finding of guilt. *Id.* By comparison, despite the military judge's finding of guilt for the words "try me," the military judge did not find underlying facts that SrA Caswell said, "try me." *See* R. at 209-10. Indeed, J.N. did not testify SrA Caswell said "try me," but rather that SrA Caswell asked J.N. "What are you trying to do[?]." R. at 57. There were no findings of guilt entered with exceptions. R. at 172, EOJ.

ARGUMENT

I.

ARTICLE 114, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO SENIOR AIRMAN CASWELL.

Additional Facts for Assignment of Error I and II

Trial defense counsel raised a motion to dismiss for failure to state an offense because they did not know how SrA Caswell's carrying of a concealed weapon was unlawful. R. at 17-18. The Government's position was that it was unlawful for SrA Caswell to carry a concealed weapon if he had been drinking. R. at 21-23, App. Ex. XVIII. Ultimately, the military judge denied the motion orally, without explanation. R. at 40. There was a motion for judicial notice of the North Carolina statute that forbids such conduct by SrA Caswell, although the military judge never ruled on that motion, and the statute was not judicially noticed. *Id.*, App. Ex. XVIII (North

Carolina law prohibits the concealed carrying of a handgun if a person has consumed alcohol). Despite the lack of judicial notice of the North Carolina statute, the Government elicited evidence that SrA Caswell was drinking that night. J.N. testified SrA Caswell had a "Mike's lemonade"[3] (an alcoholic malt beverage), and SrA J.M. testified he saw SrA Caswell drinking a Mike's lemonade at the bar. R. at 82. A.C. testified SrA Caswell was drinking that night at the bar. R. at 120.

Although the Government attempted to put on Special Agent W. L.J. to establish whether SrA Caswell had a concealed carry permit, they were unable to elicit evidence of whether SrA Caswell had a permit to carry a concealed weapon. R. at 127-29. There was no evidence of whether SrA Caswell had a permit entered into the record by the Government. *Id.*

In findings argument, the Government argued the carrying of a concealed was unlawful based solely on the permissive inference. R. at 155. Specifically, the Government argued it had met the burden of proof as to that element because SrA Caswell had a firearm on his person, and it can be inferred unlawful in the absence of evidence to the contrary. *Id.* To support that argument, Government counsel argued the military judge had not received evidence to suggest SrA Caswell lawfully had the concealed firearm. *Id.*

Standard of Review

The constitutionality of a statute is a question of law; therefore the standard of review is *de novo*. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000); *United*

[3] The full name of the beverage is Mike's Hard Lemonade.

States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005). Where an appellant argues that a statute is unconstitutional as applied, a fact-specific inquiry is required. *See Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921); *United States v. Marcum*, 60 M.J. 198, 206-08 (C.A.A.F. 2004).

Law and Analysis

Armed with no facts, and with no adoption of the requested judicial notice, the Government argued and relied on a permissive inference of unlawfulness to attain a conviction. R. at 155; *see also*, *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1311 (29 Feb. 2020). Applied in this way to SrA Caswell, Article 114, UCMJ, is unconstitutional for two reasons. First, applying the permissive inference of unlawfulness to SrA Caswell deprived him of his right to a fair trial by effectively relieving the Government of their burden of proof as to whether the carrying of a concealed weapon by SrA Caswell was "unlawful." Second, the permissive inference of unlawfulness violates SrA Caswell's Second Amendment[4] right to bear arms because it is not in keeping with the historical tradition of firearm regulation.

In light of these two constitutional dimensions, the burden shifts to the Government to show the error was harmless beyond a reasonable doubt. *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005).

[4] U.S. CONST. amend. II

1. *The permissive inference relieved the Government of their burden to prove the carrying of a concealed weapon by SrA Caswell was unlawful beyond a reasonable doubt.*

A permissible inference is only lawful where it "can . . . be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it was made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969) (citations omitted). A permissive inference "affects the application of the beyond a reasonable doubt standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979).

The Government relied solely on the inference of unlawfulness, and argued the military judge had not been given evidence it was lawful for SrA Caswell to carry a concealed weapon.[5] R. at 155. The only logical tie between the evidence of record and the inference of unlawfulness was that there was no evidence it was lawful. *Id.* This is not enough to be able to rely on the permissive inference because on these facts, there is "no rational way the trier could make the connection permitted by the inference." *Allen*, 442 U.S. at 157. Thus, this unconstitutionally relieved the Government from the burden of proving beyond a reasonable doubt that SrA Caswell's carrying of a concealed weapon was unlawful. Further, allowing the permissive inference of unlawfulness on these facts would require SrA Caswell to

[5] SrA Caswell is not assigning error as it relates to this burden shift in the Government's argument, but rather this supports the relative weakness of the evidence the Government had to rely on for this permissive inference of unlawfulness.

prove his innocence, an error of constitutional dimension. *See United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

2. The permissive inference of unlawfulness of carrying a concealed weapon violated SrA Caswell's right to bear arms because it is not in keeping with the "historical tradition of firearm regulation."[6]

As applied to SrA Caswell, when the Government argued the permissive inference that carrying a concealed weapon was unlawful, it allowed the court to infer, without further evidence, that his constitutionally protected right to keep and bear arms was unlawful.

This Court has evaluated whether the permissive inference of unlawfulness violates the constitutional rights of the accused. However, the cases are distinguishable. *United States v. Hooper* dealt with instructions in a trial before members that the members could consider both the permissive inference and notice that federal law prevents the possession of a firearm onto federal facilities to meet the element of unlawfulness of carrying a concealed weapon. *United States v. Hooper*, 2014 CCA LEXIS 685, *7 (A.F. Ct. Crim. App 24 September 2014) (unpub. op.)

Hooper evaluated the permissive inference instruction from *United States v. Lyons*[7] in light of the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Hooper*, 2014 CCA LEXIS at *10. This Court did not find plain error to provide the *Lyons* instruction to the panel, as the decision in *Heller* held that the right to possess firearms was not "a right to keep and carry any weapon whatsoever

[6] *Bruen*, 597 U.S. at 2.
[7] *United States v. Lyons*, 33 M.J. 88, 90 (C.M.A. 1991).

in any many whatsoever and for whatever purpose." *Id.* (quoting *Heller*, 554 U.S. at 626). Further, the Court noted language from *Heller* it found instructive: "[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," calling those "presumptively lawful regulatory measures." *Id.* (quoting *Heller*, 554 U.S. at 626, 627 n.26).

Distinguishable too, is *United States v. Reimers*, 2023 CCA LEXIS 38, *6 (A.F. Ct. Crim. App. 26 January 2023) (unpub. op.). There, the permissive inference did have the logical tie from the facts in the record to unlawfulness of carrying a concealed weapon – the accused was not carrying a handgun for his military duties on base, and the possession of a concealed handgun violated the Nellis Installation Defense Plan that prohibited concealed carry of firearms within Nellis Air Force Base. *Id.*

Here, the facts surrounding SrA Caswell's carrying of a concealed weapon fits neither of these scenarios. While *Heller* states that the right to keep and bear arms is not unlimited, the presumptively lawful regulatory measures at play in *Hooper* and *Reimers* are inapplicable here. *See Heller*, 554 U.S. at 626, 627 n.26. SrA Caswell was not carrying a concealed weapon in a sensitive place like a federal installation or building, nor was there evidence admitted in the record his carrying of a concealed weapon violated any other law or regulation.

Thus, despite *Heller* finding restrictions in the right to bear arms are permitted, this does not mean the Government can restrict a citizen's right to keep

and bear arms without also ensuring that restriction is in keeping with the historical traditions of firearms regulations. *See Heller*, 554 U.S. at 634-35.

The question presented is whether this permissive inference, on the facts of this record, would be consistent with the historical tradition of firearm regulation. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). Stated differently, can the Government restrict SrA Caswell's right to keep and bear arms by deeming such an act presumptively unlawful when he was acting as a private citizen in a public place, and carrying a firearm consistent with his Second Amendment right to "keep and bear arms"? *See Heller*, 554 U.S. at 634-35. In *Heller*, the Supreme Court recognized that "the Second Amendment . . . codified a *pre-existing* right [to bear arms]." *Heller*, 554 U.S. at 592. This right [to bear arms] was "enshrined with the scope [it was] understood to have when the people adopted" it. *Id.* at 634. To determine that scope, the Supreme Court analyzed the original meaning of the Second Amendment's text as well as the historical understanding of the right, concluding limitations on the right may be supported by "historical tradition." *Id.*

Thus, at the outset this Court should look to whether SrA Caswell's conduct is covered by the Second Amendment. To do so, this Court should look at what the Supreme Court analyzed in part in *Heller* – what it means to keep and bear arms. *Heller*, 554 U.S. at 584. The Supreme Court concluded that the right to "bear arms" refers to the right to "wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* (quoting *Muscarello v. United States*, 524

U.S. 125, 143 (1998) (Ginsburg, J., *dissenting*)). SrA Caswell's carrying of a concealed weapon fits this description of what it means to keep and bear arms. *See generally* R. at 55, 67-68. SrA Caswell was in public, at a bar, and when met with an escalation of back-and-forth banter to confrontation, he asked J.N. if they were going to fight and let J.N. know he was armed for such a confrontation. *Id*.

With SrA Caswell's conduct within the framework of the Second Amendment right to bear arms, the next issue is whether the Government's regulation of that conduct is in keeping with the Nation's historical traditions of firearms regulation. *Bruen*, 597 U.S. at 24. SrA Caswell was convicted for carrying a concealed weapon based on a tenuous inference that his carrying was unlawful because there was no evidence to infer otherwise. That inference is unconstitutional as applied to him because the nation's tradition of firearms regulation would not tolerate the requirement that SrA Caswell would have to prove to the Government he could keep and bear arms. *See id.* at 2. This would be like SrA Caswell having to have a "special need" that was unconstitutional in *Bruen*. *Id*.

The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules that the other Bill of Rights guarantees." *McDonald v. Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion.) The Second Amendment right to carry arms in public for self-defense, consistent with the exercise of other constitutional rights, does not require individuals to demonstrate to government officers some special need. *Bruen*, 587 U.S. at 7. While the cases cited have not directly addressed whether this right to bear arms extends without

limitation to the concealed carrying of firearms, the standard is the same. Thus, when the Government sought to charge SrA Caswell for an unlawful carrying of a concealed weapon based on the facts of this record, it did so in contravention to the nation's historical tradition of firearms regulations. *See generally Bruen*, 597 U.S. 1.

In sum, the permissive inference for unlawfully carrying a concealed weapon is unconstitutional as applied to SrA Caswell. The permissive inference relied upon here relieved the Government from their burden of proof to each element of the offense. There was no rational tie between the inference of unlawfulness and the facts of this case. Additionally, applying the permissive inference to SrA Caswell's right to bear arms in light of *Bruen* is unconstitutional.

WHEREFORE, SrA Caswell asks this Court to set aside the conviction and sentence as to the specification and Charge I.

II.

SENIOR AIRMAN CASWELL'S CONVICTION FOR CARRYING A CONCEALED WEAPON IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, . . . the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* (alteration in original) (citations and internal quotations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id.* (alteration in original) (citation omitted).

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i). This Court may provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii). Article 66 "does not require Appellant to demonstrate the entire absence of evidence supporting an element of the offense, a requirement which would be redundant with legal sufficiency review." *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at

*17 (A.F. Ct. Crim. App. 29 Apr. 2024) (unpub. op.) (citing *United States v. Harvey*, 83 M.J. 685, 691 (N-M. Ct. Crim. App. 2023), *rev. granted*, ___M.J. ___, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024)). "Rather, the statute requires Appellant 'identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.'" *Id*. This Court has inferred "Congress intended [for] the beyond a reasonable doubt standard to continue to apply in questions of factual sufficiency." *Id*. at *22.

To sustain a conviction for carrying a concealed weapon, the Government was required to prove that the carrying of the weapon was unlawful. *See* DD Form 458, *Charge Sheet;* 2019 *MCM*, Part IV, para. 52.b.(7)(b). With respect to unlawfulness, "[t]he carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary. However, the drawing of this inference is not required." *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1311 (29 Feb. 2020).

As noted under Issue I, *supra*, SrA Caswell's conviction under Article 114 hinged entirely on the presumptive inference, yet no facts before the trial court warranted such a presumption. Such a presumption should not support the legal and factual sufficiency of the conviction on appellate review because *Lyons* is distinguishable in light of the differing charging scheme in this case and the subsequent Supreme Court decisions in *Heller* and *Bruen*.

Here, as distinguished from the Article 134 offense charged in *Lyons*, SrA Caswell was charged under Article 114, UCMJ. *Compare* DD Form 458, *Charge*

Sheet, *with Lyons*, 33 M.J. at 88. That difference matters here because of the unique purpose of Article 134. Though not a "catchall as to make every irregular mischievous, or improper act a court-martial offense," *United States v. Sadinsky*, 14 C.M.A. 563, 565 (C.M.A. 1964), Article 134 is a broadly worded provision for the "purpose of capturing service discrediting conduct that might not have been foresee by the drafters of the UCMJ . . . in changing and complex military circumstances." *United States v. Saunders*, 59 M.J. 1, 9 (C.A.A.F. 2003) (citing *Parker v. Levy*, 417 U.S. 733, 745-46 (1974)). Given this purpose focused on the service and discipline, a military member's rank and duty position may have been instructive to meet an element of unlawfulness in *Lyons*. *See generally Lyons*, 33 M.J. 88. That accords with the fact that the appellant in *Lyons* concealed his firearm in his pocket not for any self-defense purpose, but rather concealed it to approach then fire it at individuals at the "scene of a beating [the appellant] had received earlier that day." *United States v. Lyons*, 30 M.J. 724, 727 (A.F.C.M.R. 1990). But the logic underlying *Lyons*, and thereby *Lyons*' holding itself, has a limited applicability here because a military member's rank and duty position are not helpful in understanding whether it would be unlawful for SrA Caswell to carry a concealed weapon off-duty, off-installation, and out in public under Article 114, UCMJ, which does not have any need to prove a military nexus through a terminal element.

Further, based on the facts in this record, the charge under Article 114, UCMJ, and the current protective posture from the Supreme Court on the right to bear arms, the presumption of unlawfulness based on *Lyons* does not hold water. The inference

of unlawfulness relied on here is not a "presumed fact [that] is more likely than not to flow from the proved fact on which it is made to depend." *Leary*, 395 U.S. at 36. The proved facts are as follows: SrA Caswell was off-duty, in public, having a drink, and carried a concealed firearm. *See generally* R. at 53-57. The Supreme Court has upheld the individual's right to carry a weapon in public for self-defense. *See Bruen*, 597 U.S. at 9-10. There was no federal, state, or local law noticed to establish whether this circumstance of carrying a concealed weapon was unlawful. R. at 40. Therefore, the recent development in Second Amendment jurisprudence erodes any support for permissive inference because there is "no rational way the trier [of fact] could make the connection permitted by the inference." *Allen*, 442 U.S. at 157.[8]

After viewing the evidence in the light most favorable to the Government, given the lack of evidence to support an inference of unlawfulness and no statute prohibiting SrA Caswell from carrying a concealed weapon in the circumstances of the charged offense, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Robinson*, 77 M.J. at 297-98. A private citizen can lawfully, in public spaces, carry a weapon. *See Bruen*, 597 U.S. at 59. Further, this record and case law do not support a finding that a person who is drinking outside a bar, in a public space, is never allowed to concealed carry.

[8] Understanding this Court is bound to follow its superior Court's precedent, *see United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citations omitted), SrA Caswell asserts that *Lyons*' approval of the permissive inference for the offense of carrying a concealed firearm should be overturned in light of its poor reasoning discussed *supra*, the intervening Second Amendment decisions discussed *supra*, and the other factors most recently reiterated by the CAAF in *United States v. Hasan*, 84 M.J. 181 (C.A.A.F. 2024) (citations omitted).

"[H]istorical evidence from antebellum America does demonstrate that the *manner* of public carry was subject to reasonable regulation." *See Bruen*, 597 U.S. at 59. But, in the absence of such a showing of a reasonable regulation, and for the reasons discussed above, the permissive inference from *Lyons* is inapplicable here. Under Article 114, UCMJ, a member's rank and duty position are irrelevant to their right to bear arms as a private citizen and when charged with an offense outside of the unique statutory purpose of Article 134, UCMJ. *See Lyons*, 33 M.J. at 90; *see also Warner*, 73 M.J. at 9 (Baker, C.J., dissenting). Without more facts to establish it is unlawful for SrA Caswell to carry a concealed weapon, this record does not prove SrA Caswell, as a citizen, off-duty, was unable to lawfully carry a concealed weapon while having a Mike's lemonade outside of a bar.

Presumably, the lack of logical connection from the facts in this case to the unlawfulness of carrying a concealed weapon was why this was the subject of motions practice. R. at 17. Trial defense counsel argued the Government failed to state an offense and that SrA Caswell did not know under which theory he was being prosecuted for carrying a concealed weapon. R. at 17-20. In response, the Government asked the military judge to take judicial notice of a North Carolina statute. R. at 20-21, App. Ex. XVIII. While there was discussion of the North Carolina statute that could support the unlawfulness of SrA Caswell's conduct with the military judge, and the military judge marked the statute as an appellate exhibit; ultimately the military judge deferred any ruling on whether this statute would be judicially noticed. R. at 40. The military judge never revisited this deferred ruling.

As such, no evidence of that law was ever entered into evidence or considered. The Government did not mention the statute in closing argument. *See* R. at 153-59. The Government relied solely on the inference of unlawfulness, and argued the military judge had not been given evidence it was lawful for SrA Caswell to carry a concealed weapon.[9] R. at 155. The only logical tie between the evidence of record and the inference of unlawfulness was that there was no evidence it was lawful. *See generally, Leary*, 395 U.S. at 36. This is not enough to be able to rely on the permissive inference because on these facts, there is "no rational way the trier could make the connection permitted by the inference." *Allen*, 442 U.S. at 157.

Without either facts to support the permissive inference that carrying of a concealed firearm was unlawful or a law or regulation that supports the unlawfulness of the carrying of a concealed weapon by SrA Caswell, his conviction for carrying a concealed weapon is factually and legally insufficient. The lack of evidence as to the unlawfulness of carrying a concealed weapon here contradicts the guilty finding. *See Csiti*, unpub. op. at *17. SrA Caswell had a firearm concealed on his person as private citizen, when he was in a public space outside of a bar. R. at 53, 55. There is nothing in the record to presume it is unlawful under those circumstances for SrA Caswell to carry a concealed firearm. The facts in the record show that the Government had no evidence to establish the unlawfulness of SrA Caswell's carrying of a concealed weapon, which contradicts the guilty finding. As such, the lack of evidence of any

[9] SrA Caswell is not assigning error as it relates to this burden shift in the Government's argument, but rather this supports the relative weakness of the evidence the Government had to rely on for this permissive inference of unlawfulness.

regulation or facts to support the finding or inference of unlawfulness cannot meet even the low threshold to sustain this conviction under legal sufficiency. *King*, 78 M.J. at 221.

WHEREFORE, SrA Caswell requests this Honorable Court set aside the finding of guilty for the specification and Charge I and the sentence.

III.

SENIOR AIRMAN CASWELL'S CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *Washington*, 57 M.J. at 399. The "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *Rodela*, 82 M.J. at 525.

Law and Analysis

The law for legal and factual sufficiency is outlined in Issue II, *supra*, and is not restated here. The issue here is whether the Government proved the entirety of specification 1 of Charge 2, that is, whether SrA Caswell stated "try me" or words to that effect. The Government charged SrA Caswell with communicating a threat to injure J.N. by stating the specific words "[T]ry me" ***and*** "[A]re we going to do this," or words to that effect. DD Form 458, *Charge Sheet* (emphasis added).

The Court of Military Appeals has directed that all words and phrases contained in a specification should be given full force and effect, and rules of interpretation are to be used to avoid rendering any word meaningless if possible.

United States v. Steele, 9 C.M.R. 9 (1953). While the Government is free to prosecute under specifications couched in language of its choice, it is bound by the language that it uses. *United States v. Geppert*, 23 C.M.R. 205 (1957).

1. *The charged language of "try me" and "are we going to do this" must be read in the conjunctive and constitute an element of the offense, to wit: the threat.*

To answer the question of whether the conviction of specification 1 of Charge II is legally and factually sufficient, this Court must first examine the charged language. In specification 1 of Charge II, SrA Caswell was charged with wrongfully communicating to J.N. a threat to injure J.N. by stating "try me" and "are we going to do this", or words to that effect, while displaying a weapon, to wit: a firearm. DD Form 458, *Charge Sheet*. The Court must answer whether the charged threats constitute an element of the crime charged, or method of committing it. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007). If the charged words of "try me" and "are we going to do this" could independently be a threat, it would be akin to charging multiple theories of liability. *See United States v. Williams*, 78 M.J. 543, 547 (A. Ct. Crim. App. 21 Aug. 2008). If the words "try me" must be joined with "are we going to do this" to constitute a threat, proving both beyond a reasonable doubt would be required to meet the burden of proof on an element[10] of the crime. *Brown*, 65 M.J. 356.

[10] Article 114, UCMJ, pt. IV, ¶ 53b.(1)(a) (communicating certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently, or in the future).

The test for whether certain language can constitute a threat under Article 134, UCMJ, is an objective one – whether a reasonable person would understand the words to express a threat. *See United States v. Rapert*, 75 M.J. 164, 166-67 (C.A.A.F. 2016). The plain reading of the charged words "are we going to do this" is not an expression of any intent to injure J.N., his property, or reputation either at the time or in the future. SrA Caswell posed a question to J.N. and let J.N. know he was armed. R. at 55. This was not an escalation by SrA Caswell to take this discussion into confrontation. *See* R. at 55, 66-67 (where J.N. admitted he understood why SrA Caswell could feel threatened by J.N. at the time J.N. stated "my girlfriend could take you" which preceded the question by SrA Caswell of "are we going to do this[?]"). The sequence of the exchange shows SrA Caswell was trying to figure out what J.N. meant by his comments about J.N.'s girlfriend being able to kick his ass. R. at 55, 66. SrA Caswell, just after he asked "are we going to do this," asked again, "What are you trying to do," "Are we still gonna do this[?]." R. at 57. Without the words "try me," SrA Caswell's questions to J.N. cannot meet the definition of a threat. SrA Caswell expressed no intent to injure without the words "try me." Even with the display of a weapon at the time the questions were posed, R. at 55-57, a reasonable person would take those words and actions by SrA Caswell to show J.N. that if he (J.N.) wanted to fight SrA Caswell, SrA Caswell was prepared to defend himself if necessary.

Based on the record and the words themselves, the charged language of "try me" and "are we going to do this" required the Government to prove both beyond a

reasonable doubt because only together do they constitute an element of the offense, to wit, a threat.

2. *The Government failed to introduce evidence to evince that SrA Caswell communicated a threat when it only offered evidence he stated "are we going to do this[?]"*

Although the military judge entered special findings at a time not prescribed by R.C.M. 918, and without a request by either party, the military judge did so to provide clarification for sentencing in terms of what conduct supported the finding of guilt for specification 1 of Charge II. R. at 207. Crucially for the issue presented here, the military judge cited no evidence to support the finding that SrA Caswell threatened J.N. with words "try me" or words to that effect. R. at 207-10.

As illustrated by the facts supporting the military judge's special findings, SrA Caswell's conviction for communicating a threat as charged by the Government should be deemed legally and factually insufficient because the evidence did not show he stated the words "try me." *See id*. The Government, in choosing what language constituted a threat, was required to prove the charged language. *Geppert*, 23 C.M.R. 205. There is no evidence upon which a factfinder could find SrA Caswell made that specific threat of "try me" to J.N., as no evidence of those words or closely associated language was offered at the court-martial. R. at 55.[11]

[11] While trial defense counsel argued the evidence was SrA Caswell stated "Are you not trying to," undersigned counsel's search of this transcript revealed no such testimony by J.N. *Compare* R. at 161, *with* R. at 55 (where J.N. testified SrA Caswell stated "Do you think YOU could take me?," "Are we going to do this or what?," or "So what are we going to do?") *and* R. at 57 (where J.N. testified SrA Caswell stated, "So

The question posed by SrA Caswell to J.N., according to J.N.'s own testimony, was, "What are you trying to do[?]" (R. at 57) and that cannot be language used to communicate a threat and by extension, is not words to the effect of "try me." SrA Caswell asking J.N. what J. N. was trying to do, is not SrA Caswell "expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future. *See MCM*, pt IV, ¶ 53b.(1)(a). Therefore, the lack of evidence of SrA Caswell stating the words "try me" is a weakness in the evidence that "contradicts a guilty finding." *Csiti*, (unpub. op.) at *17.

Although this Court has the authority to except certain language from a specification, *see United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019), the unique charging in this case and its facts render such a course improper. That is because, as outlined in section 1, above, without the words "try me," SrA Caswell's question to J.N. of "are we going to do this" is no more than a question from SrA Caswell asking where J.N. wanted to take the discussion. It is only when coupled with the words "try me" that it could transform SrA Caswell's question into an expression of an intent to injure J.N., as outlined above. As such, not just must the "try me" portion of the allegation be set aside, but the entirety of the conviction for Specification 1 of Charge II.

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are we still gonna do this?" "What are you trying to do?" "Are we still gonna do this?"). Additionally, Prosecution Exhibit 1 is an 8 second video where SrA Caswell is stating "Are you not trying to." Prox. Ex. 1. However, that video displays conduct minutes after the communications charged as threats, and thus evinced distinct, uncharged conduct. R. at 52.

Viewing the evidence in the light most favorable to the prosecution but understanding that the Government must also prove the charged language in the specification (which was wholly at their discretion), here it is fatal to the finding of guilt that no rational factfinder could find SrA Caswell ever stated a threat of "try me" or words to that effect. *Robinson*, 77 M.J. at 297-98; *Geppert*, 23 C.M.R. 205. Moreover, this failure to prove the specific charged language which was required join the language of "are we going to do this" in order to be a threat contradicts the finding of guilty. *See Csiti*, (unpub. op.) at *17; R. at 172. Therefore, the finding of guilt as to specific threat charged in specification 1 of Charge II, being unsupported by the evidence in the record, is factually and legally insufficient.

WHEREFORE, SrA Caswell respectfully requests this Honorable Court set aside the findings of guilt for Specification 1 of Charge II and the sentence.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 July 2024.

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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
Senior Airman (E-4) **JOSIAH M. CASWELL,** United States Air Force *Appellant.*	)	No. ACM 23035
	)	15 August 2024

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

ISSUES PRESENTED

I.

WHETHER ARTICLE 114, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO [APPELLANT].

II.

WHETHER [APPELLANT'S] CONVICTION FOR CARRYING A CONCEALED WEAPON IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

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

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

STATEMENT OF FACTS

Appellant was found guilty, contrary to his pleas of Charge I and its specification for unlawfully carrying a concealed weapon in violation of Article 114, UCMJ, and Specification 1 of Charge II for communicating a threat in violation of Article 115, UCMJ.

The charges and specifications stem from a night at a bar near Seven Springs, North Carolina. Before going to the bar, Appellant was at A1C D.D. [1]'s house. (R. at 106, 118.) While at the house, Appellant asked A1C D.D. if he wanted to see his "concealed carry." (R. at 118.) Appellant pulled his firearm out and showed it off for a few minutes. (R. at 78.) Appellant's firearm was not visible at the bar. (R. at 55, 107.) Appellant consumed alcohol at the bar. (R. at 54, 82, 119.) Those present at the bar included Appellant, J.N., SrA J.I., Staff Sergeant (SSgt) B.K., A.C., Airman First Class (A1C) D.D., and others.

While at the bar, Appellant went outside where J.N. and SrA J.I. were seated. (R. at 53-54.) Appellant was across the table from J.N., and they began trading insults back and forth. SrA J.I. characterized the banter as "small teasing" or "guy talk." (R. at 87.) When Appellant made a comment about J.N.'s girlfriend, J.N. told Appellant to watch his mouth. (R. at 55.)

Appellant responded by saying something along the lines of: "Do you think you could take me?" or "What are you going to do about it?" Id. J.N. responded, "My girlfriend could take you." Id. Appellant then asked again, "Do you think you could take me?" and lifted the bottom of his shirt to display his firearm. Id. Appellant then said, "Are we going to do this or what",

[1] A1C D.D.'s last name is hyphenated. Throughout the record of trial, he is referred to by his first name (which begins with D), the first part of his hyphenated last name (which begins with D), and the second part of his hyphenated last name. For consistency, he is referred to a D.D. throughout this brief.

"So what are we going to do?", "What are you trying to do?", and walked around the table to sit next to J.N. with his weapon still displayed. (R. at 55-57.)

J.N. told Appellant something like "That's a cute little gun you have there," and "Oh what would you do if I pulled the chair out from underneath you or I tackled the chair you're sitting in?" (R. at 57.) At that point Appellant stood up, cocked the weapon over J.N.'s leg, and, in a raised voice, said, "That's it." (R. at 57, 88, 100, 103, 209.) After the threat, Appellant went inside the bar and passed the weapon to A.C., and she put it in her purse. (R. at 109, 120.)

At trial, an OSI Special Agent, W.L.J., testified that there is a database containing records of concealed carry permits. (R. at 129.) SSgt M.L. testified that the bar owner stated that "if they had seen somebody walk into the bar with a gun, they would have either told them that they needed to leave or put the gun in a vehicle or take it home or anything like that." (R. at 141.)

After the presentencing hearing and the Government's sentencing argument, the military judge made special findings based on the evidence presented "in light of trial counsel's sentencing argument" to clarify that the affirmative defense of self-defense didn't apply. (R. at 207.) The military judge found beyond a reasonable doubt that these facts supported the elements of Charge II, Specification 1,:

> [J.N.'s] in-court testimony, the [Appellant] says, "Do you think you could take me", "What are you going to do about it", [J.N.] responds with, "No, my girlfriend can kick your ass" or words to that effect. The [Appellant] lifts up the bottom of his shirt. J.N. sees the firearm. While displaying a firearm, the accused says to J.N., "Are we gonna do this or what" or "What are we doing? What are we going to do" or words to that effect. J.N. says, "That's a cute little gun you have" or words to that effect. J.N. says to the [Appellant], "What would you do if I pulled the chair out from underneath you?" That's when the [Appellant] stands up and cocks the weapon over J.N.'s leg.
>
> Picking up with that same moment, I turn to [SrA J.I.'s] in-court testimony. The sound of the firearm's upper assembly racking is distinctly heard by [SrA J.I.] at that moment. The distinct metal

> sound is paired with the [Appellant's] arm movement as observed by [SrA J.I.]. Just prior to the metal sound, the witness's attention was grabbed because he heard the [Appellant] say, "That's it" in a voice that was elevated higher than the comments that he'd heard leading up to that moment.

(R. at 209.)

ARGUMENT

I.

ARTICLE 114, UCMJ, IS CONSTITUTIONAL AS APPLIED TO APPELLANT.

Standard of Review

The constitutionality of a statute is a question of law; therefore, the standard of review is de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

Article 114, UCMJ is constitutional as applied to Appellant for two reasons. First, applying the permissive inference to the charge of unlawful carrying of a concealed weapon did not improperly shift the burden of proof to Appellant; thus, Appellant's trial was fair. Second, the statute did not violate Appellant's Second Amendment right to bear arms because the permissive inference of unlawfulness is not a legal regulation within the scope of the Second Amendment.

A. Applying the permissive inference of unlawfulness of carrying a concealed weapon does not impermissibly shift the burden to Appellant.

The Government met its burden and proved Appellant unlawfully carried a concealed weapon, and the Government properly invoked the permissive inference of unlawfulness to do so. Our superior courts have long held that the permissive inference of unlawfulness for carrying

a concealed weapon does not improperly relieve the Government of its burden of proving each element beyond a reasonable doubt.

To establish that Appellant's unlawfully carried a concealed weapon, the prosecution may rely on a permissive inference, absent evidence to the contrary, that the carrying was unlawful. United States v. Davis, 54 M.J. 865, 866 (A.F. Ct. Crim. App. 2001) (citing United States v. Lyons, 33 M.J. 88, 89 (C.M.A. 1991)). Both the Supreme Court and the military appellate courts are clear that the permissive inference does not relieve the prosecution of its burden of persuasion because it is not a mandatory inference or presumption. Francis v. Franklin ,471 U.S. 307, 314-315 (1985), County Court v. Allen, 442 U.S. 140, 157-160 (1979), United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986). The prosecution must still convince the factfinder that the suggested conclusion of wrongfulness should be inferred based on the predicate facts proven. Harper, 22 M.J. at 162 (internal citations omitted). "When reviewing [a permissive inference or presumption], the Court has required the challenging party to demonstrate its invalidity as applied to him." Lyons, 33 M.J. at 90 (quoting Allen, 442 U.S. at 157). When the permissive inference is applied to an accused, it is upheld so long as "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend." Id. at 89 -90. The inference must not be "so strained as to not to have a reasonable relation to the circumstances of life as we know them." Id. The Supreme Court has also said that a permissive inference only creates an unconstitutional burden shift if, "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." Allen, 442 U.S. at 157.

At Appellant's trial, the Government's predicate facts were that Appellant showed off his "concealed carry" before going to the bar (R. at 78, 118) and then concealed his firearm under

his shirt at the bar. (R. at 55, 107.) Once there, Appellant consumed alcohol (R. at 54, 82, 119.) After arguing with J.N., Appellant lifted his shirt to reveal the weapon and threaten J. N.(R. at 138). Appellant then went inside and passed the weapon to A.C. to put in her purse. (R. at 109, 120.) The Government also introduced evidence that the bar did not allow patrons to have firearms (R. at 141) and that there was a database with concealed carry permits. (R. at 129.) No evidence contrary was introduced by either party, including evidence of Appellant having a concealed carry permit or lack of alcohol consumption. The inference that Appellant's concealed carrying was unlawful is more likely than not to flow from this evidence introduced at trial. It is more likely than not that a person carrying a concealed weapon while drinking alcohol at a drinking establishment that does not allow weapons is carrying the concealed weapon unlawfully. It is more likely than not that a person who would only display a concealed weapon in furtherance of another unlawful act, such as threatening another, is carrying the concealed weapon unlawfully. Finally, it is more likely than not that a person who would pass a concealed weapon to someone else to stash after they have revealed they were carrying it is carrying the concealed weapon unlawfully.

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). Appellant was tried by military judge alone. (R. at 43-44.) The record does not contain any evidence that the military judge misunderstood how he could use the permissive inference nor does Appellant point to anything to overcome the presumption that the military judge understood the law.

The Government properly invoked the permissive inference of unlawfulness. Use of the inference does not impermissibly shift the burden. The Government introduced sufficient facts to support the inference that it is more likely than not that Appellant's concealed carrying of the

firearm was unlawful. And there is no evidence that the military judge misapplied the permissive inference as a mandatory inference. Appellant here cannot demonstrate that he was denied a fair trial and this Court should deny his request for relief.

B. The permissive inference of unlawfulness does not deny Appellant his Second Amendment right to bear arms.

Appellant asserts that the permissive inference of unlawfulness violates his Second Amendment right to bear arms. (App. Br. at 9). This assertion is incorrect for three reasons: 1) the permissive inference is not a regulation within the scope of Bruen or its analysis of the Second Amendment; 2) the North Carolina Statute that the charge stemmed from complies with the Second Amendment and the nations historical tradition of firearms regulation; and 3) the factfinder could have considered the permissive inference of unlawfulness without the state statute being admitted at trial.

1. The permissive inference of unlawfulness is not a regulation within the scope of Bruen and does not implicate the Second Amendment.

Appellant asks this Court to overturn decades of superior court precedent based on an unreasonably expansive reading of N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). Appellant wants this Court to say the permissive inference of unlawfulness is inconsistent with the historical tradition of firearm regulation under Bruen. (App. Br. at 11). But the Bruen Court did not address the constitutionality of the permissive inference of unlawfulness. And this Court should decline to ignore binding precedent and read Bruen so broadly. This is an inappropriate expansion of the holding in Bruen, since the permissive inference is not a regulation of Appellant's right to bear arms but a method of reasoning to assist factfinders at trial. Methods of reasoning do not restrict Constitutional rights such as the Second Amendment right to bear arms. Inferences to help factfinders evaluate the evidence were not contemplated by the court in Bruen,

and this Court should not expand Bruen's holding to encompass more than statutes that regulate conduct.

2. The State law that forms the basis of the charge complies with the Second Amendment and this nation's historical tradition of firearms regulation. Therefore, the permissive inference was rightly available for consideration.

Even if this Court believes that Bruen must be applied to evaluate the constitutionality of a permissive inference, Bruen does not render the permissive inference in this case unconstitutional. The Second Amendment right to bear arms is not unlimited. District of Columbia v. Heller, 554 U.S. 570, 625 (2008). Appellant does not have the right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. Id. at 626. The Supreme Court in Bruen held that the Government must show that the *regulation* at issue reflects this nation's historical tradition of firearm regulation. Bruen, 597 US at 17 (emphasis added). In conducting its analysis, the Court specifically cited regulations limiting concealed carry in the context of the historical tradition of firearms regulation stating, "[s]tates could lawfully eliminate one kind of public carry – concealed carry – so long as they left open the option to carry openly." Bruen, 597 U.S. at 59. In Heller, the Supreme Court used concealed weapons prohibitions as an example of prohibitions that comport with the Second Amendment and the United States' historical tradition of firearms regulation. 554 U.S. at 628.

In this case, the charge properly stemmed from North Carolina General Statute Section 14-415.11 (R. 23-24, App. Ex. XVIII) which states, in relevant part, "[a]ny person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law." N.C. Gen. Stat. § 14-415.11(a). And "[i]t shall be unlawful for a person, with or without a permit, to carry a concealed handgun while consuming alcohol or at any time while the person has remaining in the person's body any alcohol…" Id. at (c2). While the

military judge never stated that he took judicial notice of the North Carolina Statute at trial, it is evident from the *Government's Response to Defense Motion to Exclude Evidence Under M.R.E. 404(b)*, dated 17 January 2023, pg. 2, 9, (App. Ex. V), the email traffic surrounding that motion (App. Ex. VI), as well as the military judge's "*Ruling: Defense's Motion in Limine: Exclude MRE 404(b) Evidence*, dated 26 January 2023, pg. 4-5, (App. Ex. VII) that the North Carolina Statute formed the basis of the charge.

A regulation requiring a permit for concealed carrying and limiting the circumstances in which a person can carry a concealed weapon, such as while consuming alcohol, as the North Carolina Statute does, is the type of regulation contemplated by the Supreme Court in Heller and Bruen. Such a statute reflects this nation's historical tradition of firearms regulation. Because the regulation that formed the basis for the charge complies with the Second Amendment and the nation's historical tradition of firearms regulation, the presumptive inference of unlawfulness was a method of reasoning properly available to the factfinder for consideration.

3. The permissive inference of unlawfulness was proper for consideration even without the state law being admitted at trial.

While the state law itself was not admitted at trial, and it is unclear whether the military judge took judicial notice of it, it was not required to be admitted for the Government to direct the factfinder to consider the permissive inference of unlawfulness. In Davis, this Court found there is no requirement that evidence of carrying a concealed weapon, in that case a knife, violated any law, statute, ordinance, or regulation. 54 M.J. 865. This Court stated, "Carrying a concealed weapon is unlawful despite the absence of a regulation, statute, or order proscribing such conduct." Id. at 866 (citing United States v. Lowe, 4 U.S.C.M.A. 654, 16 C.M.R. 228, 232-33 (C.M.A. 1954)). In Davis, the appellant asserted that his guilty plea should be overturned because the military judge failed to elicit from the appellant evidence that the carrying of the

weapon was unlawful, and no other evidence was introduced. Id. at 867. This Court rejected that argument. Holding that "there is no such requirement," the Court reasoned that "[i]f there were, the prosecution would not be able to rely on the inference that carrying a dangerous weapon in a concealed manner is unlawful in the absence of credible evidence to the contrary." Id. The permissive inference of unlawfulness for carrying a concealed weapon would be meaningless if the Government was required to admit a statute to invoke it because the statute itself establishes unlawfulness, and there would be no need for a permissive inference in the first place.

Even where the Government asks for judicial notice of a statute, and a military judge erroneously instructs a panel that the statute covers appellant's conduct, this Court has upheld the conviction based on the permissive inference. In United States v. Hooper, 2014 CCA LEXIS 685, *13-14 (A.F. Ct. Crim. App. 24 September 2014), the military judge judicially noticed a statute proposed by the Government. When instructing the panel on that statute, the military judge's instruction was erroneous because he stated that the statute prohibited the possession of firearms on military installations as a whole rather than only certain buildings. Id. at 12. There was no evidence the appellant possessed a firearm in any building, or part of a building, covered by the statute. Id. at 12-13. Despite this, the Court found no prejudice to the appellant because the "members would have relied on the permissive inference and found the appellant's concealed carrying of the weapon to be unlawful, even in the absence of the erroneous judicial notice instruction. The panel was allowed to infer the concealed carrying was unlawful in the absence of evidence to the contrary." Id. at 14 (internal quotations omitted).

As in Davis and Hooper, the Government did not admit the statute into evidence nor did the judge clearly take proper judicial notice of the state law. Absent the state law, the

Government was still permitted to ask the factfinder to use the permissive inference of unlawfulness in determining if Appellant unlawfully carried a concealed weapon. Bruen and Heller make clear that the government may constitutionally restrict concealed carry, so those cases support the continued use of the permissive inference that concealed carry is unlawful, absence evidence to the contrary. Further, in any event, use of the permissive inference by the factfinder in determining the unlawfulness of Appellant's actions is not akin to a regulation of Appellant's conduct as contemplated by the Supreme Court in Bruen. Because neither the permissive inference nor the state statute that formed the basis for the charge violate Appellant's Second Amendment right, this Court should deny this assignment of error.

II.

APPELLANT's CONVICTION FOR CARRYING A CONCEALED WEAPON IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency is reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[2]:

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

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

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

10 U.S.C. § 866(d)(1)(B).

The new standard—which makes it more difficult for an appellant to prevail on appeal—has been addressed by three service courts so far, including this one. United States v. Harvey, 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023), *rev. granted*, __M.J.__, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024); United States v. Scott, 83 M.J. 778, 779-80 (A. Ct. Crim. App. 2023), *rev'd on other grounds*, __M.J.__, No. 24-0063/AR, 2024 CAAF LEXIS 68 (C.A.A.F. 1 Feb. 2024); United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, at *19-20 (A.F. Ct. Crim. App. 29 April 2024) (unpub. op.).

In Harvey, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the new standard was more deferential to the trial court than the prior standard. 83 M.J. at 692-93. First, the NMCCA held that to make a "specific showing of a deficiency in proof," an appellant needed to "identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." Id. at 691. Second, the NMCCA determined that "'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence' is a higher standard than the prior 'recognizing that the trial court saw and heard the witnesses.'" Id. at 692. The NMCCA interpreted the new standard to mean that "Congress has implicitly created

a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty." Id., 83 M.J. at 693.[3]

In Scott, the Army Court of Criminal Appeals (ACCA) agreed with most of the NMCCA's analysis and that "the new burden of persuasion with its required deference makes it more difficult for one to prevail on appeal," but disagreed with the proposition that the new standard created a rebuttable presumption of guilt. 83 M.J. at 779-80.

Most recently, in Csiti, this Court also agreed that the new standard requires more deference to the trial court when weighing the evidence. 2024 CCA LEXIS 160, at *19. But like the ACCA, this Court declined to apply the rebuttable presumption of guilt from Harvey: "In the absence of clearer guidance, we infer Congress intended the beyond reasonable doubt standard to continue to apply in questions of factual sufficiency." Id. at *21-22. This Court then held that "in order to set aside a finding of guilty we must be *clearly convinced* that the weight of the evidence does not support the conviction beyond a reasonable doubt." Id. at *23 (emphasis added).

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

[3] The Court of Appeals for the Armed Forces has granted review on whether there is, indeed, a rebuttable presumption of guilt; as of this filing, the case is undecided.

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

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737, 742 (10th Cir. 1999) (quoting United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

Law and Analysis

The Government appropriately relied on the permissive inference of unlawfulness, to meet the third element of Article 114, UCMJ. Sufficient facts were introduced to rationally connect Appellant's conduct to the inference of unlawfulness. Because of this, Appellant's conviction for violating Article 114, UCMJ is legally and factually sufficient.

To sustain a conviction for the endangerment offense of carrying a concealed weapon in violation of Article 114, UCMJ, the evidence must have shown that at or near Seven Springs, North Carolina, on or about 21 August 2022: (1) Appellant carried a firearm concealed on or

about his person; (2)"That the carrying was unlawful;" and (3)"That the weapon was a dangerous weapon." *See* Manual for Courts-Martial (M.C.M.), United States, Part IV, para. 52.b.(7)[4]. A weapon is concealed when it is carried by a person and intentionally covered or kept from sight. M.C.M., Part IV, para. 52.c.(4)(a).

"While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (U.S. C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993).

"Carrying a concealed weapon is unlawful despite the absence of a regulation, statute, or order proscribing such conduct." Davis, 54 M.J. at 866 (citing United States v. Thompson, 14 at 41). "To establish that the carrying was unlawful, the prosecution may rely upon a permissive inference that in the absence of evidence to the contrary, the carrying was unlawful." Id. (citing Lyons, 33 M.J. at 89; Thompson, 14 C.M.R. at 42).

The Government admitted sufficient facts at trial to support Appellant's conviction for carrying a concealed firearm in violation of Article 114, UCMJ. While it is unclear whether the Military Judge took judicial notice of the North Carolina statute that formed the basis of the charge, it was not required. Davis, 54 M.J. at 866.

The permissive inference analysis requires use of common sense and experience. *See* Barnes v. United States, 412 U.S. 837, 846 n. 11, 93 S. Ct. 2357, 2363 n. 11, 37 L. Ed. 2d 380 (1973). Appellant's conduct before, during, and after the altercation support the permissive inference that he was unlawfully carrying a concealed weapon. Appellant brought his concealed

[4] All references to the Manual for Courts-Martial are to the 2019 edition which was in effect at the time of Appellant's court-martial.

weapon to a bar that did not allow weapons. (R. at 141). While at the bar, Appellant consumed alcohol. (R. at 54, 82, 119.) Appellant hid his weapon throughout his time at the bar until he used it to support his threat to J.N., despite proudly displaying his new firearm to his friends "show-and-tell" style before going to the bar. (R. at 78, 112.) He hid his weapon under his shirt until he raised his shirt to brandish the firearm as a threat to J.N. (R. at 138.) After the altercation, he relieved himself of the weapon by passing it to a friend who stashed it in her purse. (R. at 109, 120) At trial, an OSI Special Agent testified that there is a database containing records of concealed carry permits. (R. at 129.)

Common sense and experience support the inference that Appellant's concealed carrying at the bar was unlawful. There was no testimony that Appellant had a permit to concealed carry, and he was consuming alcohol while he was at the bar. Appellant's actions of hiding his firearm under his shirt at the bar, brandishing the weapon in support of a threat, and then handing it to a friend to put in her purse sufficiently establish a rational connection to the inference that his carrying was unlawful. If Appellant had been lawfully carrying the gun, there would have been no reason for him to pass it off to a friend after the incident.

Appellant attempts to distinguish the facts here from Lyons 33 M.J. 88. He asserts that the permissive inference analysis in Lyons has limited applicability because Lyons involved an appellant concealing his firearm to approach and fire it at individuals and had no purpose of self-defense. (App. Br. at 16). Appellant's argument is unpersuasive. The facts of Lyons are analogous to the facts here where Appellant concealed his weapon until he displayed it in a threat of violence. Just as in Lyons, Appellant was not carrying his concealed firearm with the intent to use it for self-defense purposes. Lyons, 30 M.J. at 727. Nothing in the record indicates that there was any anticipated threat to Appellant when he concealed his firearm before entering the

bar to have a drink. Lyons suggests that in determining whether there are sufficient facts to support the permissive inference of unlawfulness, the Court should evaluate the facts as applied to the individual and under the circumstances of his case. Id. at 90. While in Lyons, the appellant's rank and duty assignment were telling as to whether he would have been required to carry a weapon on base, in Appellant's case his actions were also telling as to whether he would have been allowed to engage in concealed carry under the circumstances. Considering that Appellant (1) had sufficient knowledge of carrying a firearm to term it a "concealed carry," (2) was consuming alcohol while carrying the concealed weapon, and (3) passed the weapon to A.C. to put in her purse following the altercation with J.N., this Court can be confident that the presumption of unlawfulness was "more likely than not to flow from" those circumstances. *See* id. at 90.

While the Supreme Court has upheld the individual's right to carry a weapon in public for self-defense, the Court was clear that the right to carry in public is "subject to certain reasonable, well-defined restrictions." Bruen, 597 U.S. at 70. When referring to the public carry of firearms for self-defense, the Court carved out a distinction between concealed carrying and open carrying. *See*, Bruen, 597 U.S. 53, 54 (pointing to state statutes that were upheld as lawful in Alabama, and Georgia because they prohibited concealed carrying rather than open carrying). In fact, the Court cited Reconstruction era limits prohibiting the "unlawful practice of carrying concealed weapons" as being "consistent with a right of the public to peaceably carry handguns for self-defense. Id. at 62-63. Appellant did not have the right to carry his firearm in any manner he chose, even for self-defense purposes. Heller, 554 U.S. at 626.

A rational fact finder viewing the evidence in the light most favorable to the prosecution could find Appellant unlawfully carried a concealed firearm. The unlawfulness of Appellant's

concealed firearm was established by the rational connection a reasonable factfinder could draw from his actions. Appellant's conduct of consuming alcohol while the firearm was concealed, passing the firearm to a friend to put in her purse after threatening J.N. with it, and the existence of a database for concealed carry permits establish the inference of unlawfulness. This is especially true given there is no evidence in the record to the contrary, such as the fact that Appellant had a concealed carry permit. Additionally, viewing the evidence detailed above, this Court should not be *clearly convinced* that the weight of the evidence does not support the conviction beyond a reasonable doubt. Based on this, the conviction is legally and factually sufficient. Thus, Appellant is not entitled to relief.

III.

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

Standard of Review

The standard of review for legal and factual sufficiency is outlined in Section II, above, and is not restated here.

Law and Analysis

Appellant was found guilty of communicating a threat in violation of Article 115, UCMJ by wrongfully communicating to [J.N.] a threat to injure [J.N.] by stating "try me" and "are we going to do this", or words to that effect, while displaying a weapon, to wit: a firearm. (*EOJ,* dated 20 February 2023, ROT Vol. 1). By introducing evidence that Appellant communicated a similar meaning through his words and actions to that of the charged specification, the Government met its burden of proof, and Appellant's conviction is legally and factually sufficient.

To sustain a conviction for communicating a threat in violation of Article 115, UCMJ, the evidence had to show: (1) That at or near Seven Springs, North Carolina, on or about 21 August 2022, Appellant "did communicate certain language expressing a present determination or intent to injure" J.N. presently or in the future, to wit: "try me" and "are we going to do this", or words to that effect while displaying a weapon, to wit: a firearm; (2) "That the communication was made known to that person or to a third person"; (3) "That the communication was wrongful." M.C.M., Part IV, para. 53.b.(1). An element for displaying a weapon is not contained within the Manual for Courts-Martial, but the Government added the language to the specification and was required to prove it. (R. at 161.)

A. The Government presented sufficient evidence that Appellant communicated a threat by stating "are we going to do this" or words to that effect while displaying a firearm.

Appellant's main argument hinges on his belief that the Government did not prove at trial that Appellant used the words "try me," as charged in the specification. (App. Br. at 21-24.) Appellant then contends that the charged language of "are we going to do this" without the accompanying "try me" constituted mere questions and would not be perceived as a threat by a reasonable person. (App. Br. at 22). But this claim ignores the important remaining piece of the charge: "while displaying a firearm." (*Charge Sheet*, dated 26 September 2022, ROT, Vol. 1). The Government intentionally added language to the offense escalating the comments from mere questions to threats of violence through the display of a lethal weapon. (R. at 208.)

Article 115, UCMJ encompasses more than just spoken language in the communication of a threat. M.C.M., Part IV, para. 53.c.(1). Analysis of the first element is an objective inquiry from the viewpoint of a reasonable person in the recipient's place. United Sates v. Phillips, 42 M.J. 127, 130 (C.A.A.F. 1995). "This objective inquiry examines both the language of the communication itself as well as its surrounding context, which may qualify or belie the literal

meaning of the language." United States v. Harrington, 83 M.J. 408, 414 (C.A.A.F. 2023) (internal citation omitted).

Even considering the words "are we going to do this?" alone, those words, when coupled with the surrounding context of Appellant revealing his firearm and moving closer to J.N. communicates, and would be understood by a reasonable person in J.N.'s place to communicate, a present determination or intent to kill, injure or intimidate J.N. By introducing both the language, the display of the firearm, and Appellant moving closer to J.N. the Government presented sufficient evidence that Appellant was communicating a threat – even if Appellant did not utter the additional words "try me."

B. The Government introduced sufficient evidence that Appellant said words to the effect of "try me."

When the Government charges an offense with the inclusion of "or words to that effect" the Government is not required to prove the precise words set forth in the specification. United States v. Perez, 2005 CCA LEXIS 142 (A.F. Ct. Crim. App. 26 April 2005) (citing United States v. Woltmann, 22 C.M.R. 737, 738-39 (C.G.C.M.R. 1956)). The court looks to whether the communication was to the same effect as the words stated in the specification. Id. The Court of Appeals for the Armed Forces has found that the general qualifier "or words to that effect" suggests that the wording is not to be considered as being alleged verbatim in the specification. United States v. Pritchard, 45 M.J. 126 (C.A.A.F. 1996).

The Government introduced evidence of words to the same effect as the words "try me." "Try me" is an idiom used to tell someone to give him a chance to do something[5]. In the context of the altercation, it would be used to communicate that someone is willing to act if the other

[5] *Try Me Definition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/try%20me (last visited 30 July 2024)

party continues. Similarly, "that's it" is an idiom that is used in an angry or annoyed way to say that one will not accept any more of something[6].

SrA J.I. testified that towards the end of the back-and-forth between Appellant and J.N. he heard Appellant say, "that's it" and then heard a metal sound he identified as the chambering of a round on a weapon. (R. at 88.) Appellant's additional actions of displaying the firearm, and saying, "what are you going to do about it", "are we gonna do this or what", and "Do you think you could take me?" (R. at 55-57) renders the communication to the same effect as the language in the specification. Appellant communicated an exasperated threat through his words and displaying a firearm after becoming fed up with the back and forth arguing with J.N.

The military judge's findings of fact must be afforded appropriate deference. 10 U.S.C. § 866(d)(1)(B)(ii)(II). The military judge entered special findings detailing facts that supported the charge at issue. In particular, he found that Appellant said, "Do you think you could take me", "What are you going to do about it" and lifted the bottom of his shirt and J.N. saw the firearm. While displaying the firearm, Appellant said, "are we going to do this or what" or words to that effect. J.N. said to Appellant "what would you do if I pulled the chair out from underneath you?" and Appellant then stood up and cocked the weapon over J.N.'s leg and said, "that's it" in an elevated voice. (R. at 209.) His findings are sufficiently supported by the record and demonstrate that he appropriately considered all the facts in finding Appellant guilty of words to the effect of the charged language.

In consideration of the facts detailed above, and after giving appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, and appropriate

[6] *That's It Definition,* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/that%27s%20it (last visited 30 July 2024)

deference to the findings of fact entered into the record by the military judge, Appellant has not shown a deficiency of proof in the finding of guilt. Further, this Court should not be *clearly convinced* that the finding of guilty was against the weight of the evidence. The findings were factually sufficient. Additionally, a rational factfinder, after viewing the evidence in the light most favorable to the prosecution, could find the elements of Charge II, Specification 1 were proven beyond a reasonable doubt. The findings were legally sufficient.

Should this Court disagree with the Government and find that the admitted evidence admitted at trial did not prove words to the effect of "try me" in communicating a threat, this Court can use its power under Article 66(d), UCMJ and except the words "try me" from the specification. "In performing its review under Article 66[d], UCMJ, a Court of Criminal Appeals may narrow the scope of an appellant's conviction to that conduct it deems legally and factually sufficient." United States v. English, 79 M.J. 116, 120 (C.A.A.F. 2019) (internal citations omitted). For example, in United States v. Blow, 2022 CCA LEXIS 495 at *51 (A.F. Ct. Crim. App. Aug. 23, 2022), after finding insufficient evidence, this Court excepted out several words ("and head" and "with his hand") from an assault consummated by battery specification under Article 128. This left the specification to allege only that the appellant had struck the victim "in the body with a belt." Id.

Our sister court has also exercised this power to except language in a similar manner by excepting the word 'anus' and 'inner thigh' from specifications alleging violations of Article 120. United States v. Wilson, 2023 CCA LEXIS 234, n.1 (A. Ct. Crim. App. 31 May 2023), (*rev'd on other grounds*, 2024 CAAF LEXIS 287 (C.A.A.F. 23 May 2024)). Here, similar to Blow and Wilson, this Court could except out the words "try me," leaving the narrower offense

that Appellant communicated a threat by saying "are we going to do this?" while displaying a firearm.

In the end, for the reasons described in section A. above, even if this Court excepts the words "try me" from the specification, Appellant's conviction for communicating a threat is still legally and factually sufficient. This Court should deny this assignment of error.

CONCLUSION

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

[redacted]

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MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
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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 August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF**
	)	Before Panel No. 1
v.	)	
	)	No. ACM 23035
Senior Airman (E-4) **JOSIAH M. CASWELL,** United States Air Force, *Appellant.*	)	22 August 2024

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

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Josiah M. Caswell (Appellant), hereby files this reply to the Appellee's Answer, filed 15 August 2024 (Answer). SrA Caswell stands on the arguments in his brief, filed 16 July 2024 (Appellant's Br.), and in reply to the Answer submits the additional arguments for the issues listed below.

I.

ARTICLE 114, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO SENIOR AIRMAN CASWELL.

1. *The permissive inference relieved the Government of their burden to prove the carrying of a concealed weapon by SrA Caswell was unlawful beyond a reasonable doubt.*

The Government relied on a permissive inference to prove the carrying of a concealed weapon by SrA Caswell was unlawful, specifically that the fact-finder could presume it was unlawful to concealed carry absent evidence to the contrary. R. at 155. Whether a permissive inference relieves the Government of the burden of proof is rooted in whether the there is a rational way the trier of fact could make the connection permitted by the inference. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979). The inference must not be "so strained as

not to have a reasonable relation to the circumstances of life as we know them . . . ." *Tot v. United States*, 319 U.S. 463, 468 (1943). The permissive inference here strains any reasonable relation to the circumstances of life as we know them because SrA Caswell, as a private citizen, was out with friends at a bar in North Carolina, R. at 53-54, had a Mike's Hard Lemonade, R. at 54, 82, and was carrying a concealed weapon that many individuals in his group had seen or knew about.[1] R. at 109, 119-20. These facts do not show the necessary relation, thus reliance on the permissive inference relieved the Government of the burden to prove the carrying of a concealed weapon was unlawful.

Evidence might have shown the necessary "reasonable relation" in this case, had the Government garnered its admission. For example, the Government argues that, at trial, evidence was introduced "that the bar did not allow patrons to have firearms." Answer at 6 (citing R. at 141). Except that is not the evidence that was introduced specific to the night in question. There was no evidence entered into the record that the location had any signage stating weapons were prohibited. R. at 141. Instead, the Government introduced only after-the-fact, conditional testimony, with the owner of the bar stating he would have told any patron with a weapon to leave or store it in the car. *Id*. Such an internalized code of conduct is no basis for a permissive inference.

Similar evidentiary gaps plague the other matters claimed by the Government's brief as supporting the permissive inference in this case. Answer at 5-6. The Government might have

[1] The Government also avers the inference was appropriate because SrA Caswell handed his gun to someone else and he displayed the gun when confronted by J.N. Answer at 16. However, in context, neither of those facts support SrA Caswell was unlawfully carrying a concealed weapon. After the confrontation with J.N., SrA Caswell was shaken up, was crying, and locked himself in the car. R. at 66, 113, 123. In context, handing the gun off is consistent with the fact that he was shaken up and scared, and wanted to remove himself from the situation. The context of SrA Caswell displaying the weapon shows nothing more than SrA Caswell letting J.N. know that he was armed, should J.N. want to continue to escalate the situation. R. at 55, 66-68. Thus, neither of these facts support the inference the carrying was unlawful.

introduced evidence that having one Mike's Hard Lemonade or any alcoholic beverage would render the carrying of a concealed weapon unlawful. It did not. Likewise, the Government introduced the facts that a database for concealed carry permits existed and the Government had access to that database. R. at 129. But the Government failed to connect that database to SrA Caswell because there was no evidence whether a permit was required to be lawful, nor whether SrA Caswell had such a permit. *Id*.

Further, this permissive inference, which states that "the carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary," unconstitutionally shifts the burden to SrA Caswell because it requires SrA Caswell to demonstrate his possession was lawful when the Government does not provide evidence upon which to infer the carrying of a concealed weapon was unlawful. *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1311-12 (29 Feb. 2020). This burden shift is apparent based on simple logic. The Government did not and would not put on evidence SrA Caswell had a permit or was otherwise authorized to concealed carry in the location and manner in which the Government charged as unlawful. And absent the Government putting in any evidence that carrying a concealed weapon was against some law or regulation, the only other person who has any ability to enter evidence is SrA Caswell.

Here, when the Government did not ensure the fact-finder had taken judicial notice of the North Carolina statute to prove it was unlawful and could not get evidence of whether SrA Caswell had a permit to conceal carry into evidence, there was no evidence of whether the carrying of a concealed weapon was unlawful. SrA Caswell was then left to prove his own innocence given the Government relied on the permissive inference of unlawfulness without facts to support such an inference. SrA Caswell is constitutionally protected from the burden to produce evidence of his

innocence, that is, to produce evidence he had a permit or was authorized to concealed carry. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

2. *The permissive inference of the unlawfulness of carrying a concealed weapon violated SrA Caswell's right to bear arms because it is not in keeping with the "historical tradition of firearm regulation."*[2]

Article 114, UCMJ, is not a regulation to restrict SrA Caswell's right to bear arms, but the permissive inference as applied to SrA Caswell has the effect of unconstitutionally limiting his right to bear arms. SrA Caswell, based on the Government's use of the permissive inference of unlawfulness, had to demonstrate what amounts to a "special need" to lawfully exercise his right to bear arms – thus there is a regulatory effect to the Article 114, UCMJ. This "special need" relates to the permissive inference's shift to SrA Caswell to prove the carrying of his concealed weapon was lawful, given the presumption can apply in the absence of evidence to the contrary. Given this regulatory effect of the inference, and in light of the Supreme Court's decisions in *Bruen* and *District of Columbia v. Heller*, the Government cannot restrict a citizen's right to keep and bear arms without also ensuring that restriction is in keeping with the historical traditions of firearms regulations. *Bruen*, 597 U.S. at 2; *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

Therefore, the issue is whether the regulatory effects of this permissive inference, on the facts of this record, would be consistent with the historical tradition of firearm regulation. While a state law from North Carolina is alleged to have formed the basis of this charge, Answer at 8, no such law dictated the unlawfulness of SrA Caswell's carrying of a concealed weapon at findings. R. at 40. The only evidence the Government admitted and argued was that SrA Caswell was acting as a private citizen in a public place, R. at 53-54, had a Mike's Hard Lemonade, R. at 54, 82, and

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

when confronted, asked J.N. if J.N. wanted to continue to escalate the argument knowing SrA Caswell was armed to defend himself. R. at 55, 66-68.

When the Government sought to prove SrA Caswell unlawfully carried a concealed weapon based on these facts, it did so in contravention of the nation's historical tradition of firearms regulations. *See Bruen*, 597 U.S. 1. In using the permissive inference against SrA Caswell when no facts could support an inference of unlawfulness, this acted as a requirement for SrA Caswell to have a "special need" to concealed carry because it required him to prove to the Government his carrying was lawful, in contravention to *Bruen. Id.* at 2.

WHEREFORE, SrA Caswell asks this Court to set aside the conviction and sentence as to Charge I and its specification.

II.

SENIOR AIRMAN CASWELL'S CONVICTION FOR CARRYING A CONCEALED WEAPON IS LEGALLY AND FACTUALLY INSUFFICIENT.

This Court should not sustain SrA Caswell's conviction for carrying a concealed weapon because the Government relied solely on the permissive inference to prove unlawfulness, and the facts of this case did not support the drawing of such an inference. The North Carolina statute was not judicially noticed by the military judge. R. at 40. The military judge never revisited the deferred ruling. This is consistent with the Government declining to mention the statute in closing argument. *See* R. at 153-59. As outlined above in issue I, the facts upon which the permissive inference was based do not support a finding of guilt, even when viewed in a light most favorable to the Government. The record does not support a finding that SrA Caswell's carrying of a concealed weapon was unlawful, which contradicts a guilty finding and renders the conviction factually insufficient. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *17 (A.F.

Ct. Crim. App. 29 Apr. 2024) (unpub. op.). Additionally, the lack of evidence of any regulation or facts to support the finding or inference of unlawfulness cannot meet even the low threshold to sustain this conviction under legal sufficiency. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

WHEREFORE, SrA Caswell requests this Honorable Court set aside the finding of guilty for Charge I and its specification and the sentence.

III.

SENIOR AIRMAN CASWELL'S CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY AND FACTUALLY INSUFFICIENT.

To constitute a violation of Article 115, UCMJ, there has to be a communication of *certain language* that expresses a present determination or intent. *See MCM*, Part. IV, ¶ 53b.(1)(a) (communicating certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently, or in the future) (emphasis added). While the Government was free to charge SrA Caswell with communicating a threat and also allege that he did so *while displaying a firearm*, *see* Answer at 19, that additional element did not change the central question underlying the allegation, namely whether the communication expressed a present determination or intent through *certain language*. The Government charged certain language, to wit, "are we going to do this, and try me," or words to that effect. *Charge Sheet*, DD Form 458. It is those charged words that must have expressed the intent or present determination given the plain meaning of the words of the statute. Indeed, the Government agreed at trial that when it added "while displaying a firearm" to Charge II, specification 1, it added a fourth element to the Article 115, UCMJ offense. R. at 161, 169.

Displaying a firearm is context that may "qualify or belie the literal meaning of the language." *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citation omitted).

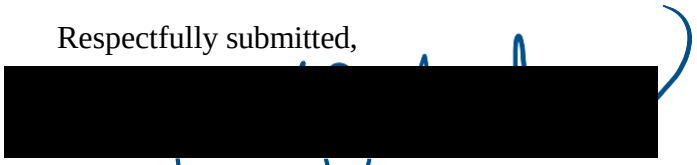
However, SrA Caswell's question of "are we going to do this?" even while displaying a firearm is not an expression of any present determination or intent to do anything. Rather, the question of "are we going to do this" in that context is better understood as SrA Caswell asking J.N. if J.N. wanted to escalate the argument knowing SrA Caswell was armed. R. at 55, 66-68.

Further, as the Government's brief acknowledges but then endeavors to brush aside, "try me" is not interchangeable with "that's it." *See* Answer at 20-21. Even if "that's it" and "try me" were interchangeable, the military judge ruled that the alleged events related to chambering a round and SrA Caswell saying "that's it" happened after the threat he was found guilty of. R. at 210. As such, both in meaning and in context, the Government's reliance on the phrase "that's it" and its surrounding circumstance fails to cure the deficient proof of the charged language.

SrA Caswell's conviction for communicating a threat as charged by the Government is legally and factually insufficient because there was no evidence upon which a factfinder could find SrA Caswell had a present determination or intent to do anything by asking "are we going to do this." The Government did not prove that SrA Caswell stated the words "try me," which is a weakness in the evidence that "contradicts a guilty finding" to specification 1 of Charge II. *Csiti*, 2024 CCA LEXIS 160 at *17. The Government's failure to prove the specific charged language of "try me" is also a weakness in the Government's proof that "are we going to do this" was an expression of a present determination or intent to do anything, which also contradicts the finding of guilty. *Id.*, R. at 172. Therefore, the finding of guilt as to the specific threat charged in specification 1 of Charge II was unsupported by the evidence in the record and is factually and legally insufficient.

WHEREFORE, SrA Caswell respectfully requests this Honorable Court set aside the findings of guilt for Specification 1 of Charge II and the sentence.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

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

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23035**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Josiah M. CASWELL	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 22 August 2024, Appellant filed a Motion for Oral Argument on the issue of "whether Article 114, [Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914,] is unconstitutional as applied to [Appellant]." The Government did not oppose the motion "so long as oral argument can be held within 30 to 45 days of the date of this filing."

Oral argument is hereby ordered on the following issue:*

> **WHETHER APPELLANT'S CONVICTION FOR CARRYING A CONCEALED WEAPON UNDER ARTICLE 114, UCMJ, IS LEGALLY SUFFICIENT IN LIGHT OF *TOT V. UNITED STATES,* 319 U.S. 463 (1943), AND *N.Y. STATE RIFLE & PISTOL ASS'N V. BRUEN*, 597 U.S. 1 (2022), WHERE THE GOVERNMENT RELIED ON THE JUDICIALLY CREATED PERMISSIVE INFERENCE OF UNLAWFULNESS FROM *UNITED STATES V. LYONS*, 33 M.J. 88 (C.M.A. 1991).**

Accordingly, it is by the court on this 11th day of September, 2024,

ORDERED:

Appellant's Motion for Oral Argument is **GRANTED.**

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* We reword the issue as it relates to Appellant's second assignment of error.

Oral argument in the above-captioned case will be heard at a location, time, and date to be set by future order of this court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ORAL ARGUMENT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **JOSIAH M. CASWELL,** United States Air Force *Appellant.*	)	No. ACM 23035 22 August 2024

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

Pursuant to Rule 23.3(a) and Rule 25 of this Court's Rules of Practice and Procedure, SrA Caswell moves this Court to order oral argument on the following issue:

WHETHER ARTICLE 114, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO SENIOR AIRMAN CASWELL.

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' NONOPPOSITION TO MOTION FOR ORAL ARGUMENT**
v.	)	No. ACM 23035
Senior Airman (E-4) **JOSIAH M. CASWELL,** United States Air Force *Appellant.*	)	Panel No. 1
	)	22 August 2024

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

On 22 August 2024, Appellant submitted a Motion for Oral Argument on Issue I of his Assignments of Error. The Government does not oppose the Motion so long as oral argument can be held within 30 to 45 days of the date of this filing, so appellate review of this case remains timely in accordance with United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

[redacted]
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Appellate Government Counsel, Government Trial and Appellate Operations Division
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Associate Chief, Government Trial and Appellate Operations Division
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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 22 August 2024 via electronic filing.

HEATHER R. BEZOLD, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23035**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Josiah M. CASWELL	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 11 September 2024, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER APPELLANT'S CONVICTION FOR CARRYING A CONCEALED WEAPON UNDER ARTICLE 114, UCMJ, IS LEGALLY SUFFICIENT IN LIGHT OF *TOT V. UNITED STATES,* 319 U.S. 463 (1943), AND *N.Y. STATE RIFLE & PISTOL ASS'N V. BRUEN*, 597 U.S. 1 (2022), WHERE THE GOVERNMENT RELIED ON THE JUDICIALLY CREATED PERMISSIVE INFERENCE OF UNLAWFULNESS FROM *UNITED STATES V. LYONS*, 33 M.J. 88 (C.M.A. 1991).**

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

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Tuesday, the 21st day of October 2024**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23035**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Josiah M. CASWELL	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 11 September 2024, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER APPELLANT'S CONVICTION FOR CARRYING A CONCEALED WEAPON UNDER ARTICLE 114, UCMJ, IS LEGALLY SUFFICIENT IN LIGHT OF *TOT V. UNITED STATES,* 319 U.S. 463 (1943), AND *N.Y. STATE RIFLE & PISTOL ASS'N V. BRUEN*, 597 U.S. 1 (2022), WHERE THE GOVERNMENT RELIED ON THE JUDICIALLY CREATED PERMISSIVE INFERENCE OF UNLAWFULNESS FROM *UNITED STATES V. LYONS*, 33 M.J. 88 (C.M.A. 1991).**

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

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Monday, the 21st day of October 2024**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE OF**
Appellee	)	**GOVERNMENT COUNSEL**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 23035
JOSIAH M. CASWELL,	)	
United States Air Force	)	17 October 2024
Appellant	)	

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

The undersigned hereby enters appearance as counsel for the United States in the above captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will appear as co-counsel for the United States.

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Appellate Government Counsel
Government Trial & Appellate Operations Division
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 17 October 2024.

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **JOSIAH M. CASWELL** United States Air Force *Appellant*	**NOTICE OF APPEARANCE** Before Panel No. 1 No. ACM 23035 17 October 2024

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

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, Megan P. Marinos files this written notice of appearance. Ms. Marinos will sit second chair at Appellant's table at oral argument as supervisory counsel.

Respectfully submitted,

[redacted]

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Senior Counsel
Air Force Appellate Defense Division
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megan.marinos@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 Division on 17 October 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO CITE SUPPLEMENTAL AUTHORIT Y
v.	)	Before Panel No. 1
Senior Airman (E-4) **JOSIAH M. CASWELL,** United States Air Force *Appellant.*	)	No. ACM 23035 25 October 2024

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

Pursuant to Rules 23.3(d) and 25.2(e) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit supplemental citation of authority because the Government cited additional relevant law during oral argument. The below case is relevant for this Court to consider when deciding Issue I as reworded by this Court:

> Whether Appellant's conviction for carrying a concealed weapon under Article 114, UCMJ, is legally sufficient in light of Tot v. United States, 319 U.S. 463 (1943), and N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022), where the Government relied on the judicially created permissive inference of unlawfulness from United States v. Lyons, 33 M.J. 88 (C.M.A. 1991).

Where there are sufficient additional facts to support the conclusion, the permissive inference is merely a reminder to the fact finder to not check their common sense at the door.

During oral argument, the issue of whether there were sufficient facts to support the inference of unlawfulness was raised. Where sufficient evidence is introduced, the permissive inference becomes "nothing more than a reminder to the [fact finder] that they need not check [their] common sense at the door to the deliberation room." United States v. Brewer, 61 M.J. 425, 427 (C.A.A.F. 2005) Brewer is relevant for this Court's consideration because, in this case, there were sufficient facts introduced to render the permissive inference nothing more than a

GRANTED
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reminder. As discussed during oral argument and in line with Brewer, the facts about the database, Appellant passing the weapon off, and the presence and consumption of alcohol, constituted sufficient evidence to render the permissive inference of unlawfulness merely a reminder to the factfinder to evaluate the case with common sense.

WHEREFORE, the United States respectfully requests that this Honorable Court grant its motion to submit supplemental citation of authority.

[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 25 October 2024.

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