IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
Technical Sergeant (E-6), **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM XXXXX
	)	28 August 2023

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

On 4 April and 23-26 May 2022, a military judge sitting as a general court-martial convened at Eielson Air Force Base, Alaska, convicted Technical Sergeant (TSgt) Matthew S. Henderson, contrary to his pleas, of two specifications of failure to obey a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892 (2019).[1] The military judge sentenced TSgt Henderson to a reprimand, reduction to the grade of E-4, and ten days of hard labor without confinement. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 30 June 2022.

On 31 May 2023, the Government purportedly sent TSgt Henderson the required notice by mail of his right to appeal within 90 days. Pursuant Article 66(b)(1)(A), UCMJ, TSgt Henderson files his notice of direct appeal with this Court.

[1] TSgt Henderson was acquitted of one specification of dereliction of duty in violation of Article 92 UCMJ, one specification of maltreatment in violation of Article 93, UCMJ, one specification of abusive sexual contact in violation of Article 120, UCMJ, and one specification of indecent exposure in violation of Article 120c, UCMJ.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite **1100**
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Office: (240) 612-4770
Email: frederick.johnson.1l@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing were sent via email to the Comi and se1ved on the Government Trial and Appellate Operations Division on 28 August 2023.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Henderson, MATTHEW S.	)	**DOCKETING**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 28 August 2023. On 7 September 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

Accordingly, it is by the court on this 11th day of September, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 3. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 26 May 2022, Appellant was convicted at a general court-martial of two specifications of violating a general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892.[1] A military judge sentenced Appellant to 10 days hard labor without confinement, reduction to the grade of E-4, and a reprimand. On 28 August 2023, Appellant filed a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A),[2] which was docketed with this court on 11 September 2023.

On 12 September 2023, Appellant moved to attach an email to present to this court that the Government requested the Air Force Trial Judiciary produce a verbatim transcript in his case. Appellant further requested that this court suspend Rule 18 until such time a verbatim transcript has been produced by the Government. *See* JT. CT. CRIM. APP. R. 18.

On 15 September 2023, the Government responded indicating that they do not oppose Appellant's motion but requested no deadline be set at this time.

In consideration of the foregoing, and the Government's position, the court grants Appellant's Motion to Attach, suspends Rule 18, and establishes a timeline for the completion of this transcript in the decretal paragraph below.

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

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

Accordingly, it is by the court on this 19th day of September 2023,

ORDERED:

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

It is further ordered:

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **14 November 2023**. If the transcript cannot be provided to the court and the parties by that date, the Government will inform the court in writing not later than **7 November 2023** of the status of the Government's compliance with this order.

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force *Appellant*	)))))))))	**MOTION TO ATTACH AND SUSPEND RULE 18** Before Panel 3 No. ACM 40419 12 September 2023

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

Pursuant to Rule 23.3(b) and 23.3(r) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Matthew S. Henderson hereby moves (1) to attach the document contained in the Appendix to the Record of Trial and (2) for this Honorable Court to suspend its rule regarding the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until the verbatim transcript is produced.

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

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

Respectfully submitted,

[redacted]

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

Appendix

1. Government's Email to JAT Central Docketing Workflow, dated 31 August 2023.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 September 2023.

Respectfully submitted,

[redacted]

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

15 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM 40419 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion to Attach and Suspend Rule 18. A verbatim transcript is being prepared for Appellant's case. The United States respectfully requests that this Court not set a particular due date for production of the verbatim transcript, unless it later becomes necessary to intervene. Should Appellant believe production of the verbatim transcript has taken too long, he can file for relief in his assignments of error brief.

WHEREFORE, the United States respectfully requests that this Court grant Appellant's 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 15 September 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 19 September 2023, the court granted Appellant's Motion to Attach and Suspend Rule 18 and ordered the Government to provide a verbatim transcript to the court, appellate defense counsel, and appellate government counsel not later than 14 November 2023. On 28 September 2023, Appellee moved the court to amend this order to reflect a new suspense date of 14 December 2023 for the production of the verbatim transcript. Appellant did not submit any opposition.

On 5 October 2023, the court held a status conference to discuss the progress of transcription as well as to inquire whether the parties have explored other available options under the applicable rules for complying with this court's 19 September 2023 order. Major Allen Abrams and Major Frederick Johnson represented Appellant. The Associate Chief for the Appellate Government Counsel Division, Ms. Mary Ellen Payne, represented the Government. Ms. Bryce Grunwald from the Air Force Trial Judiciary attended telephonically. The parties clearly expressed that they all want a verbatim transcript. Ms. Grunwald represented that the detailed court reporter would likely complete the transcription a few weeks prior to the proposed new date, 14 December 2023.

Having considered the procedural posture of the case, the positions of the parties, as well as the likelihood that this will be the singular request for a delay in providing the ordered transcription; the new date is not unreasonable.

Accordingly, it is by the court on this 5th day of October, 2023,

ORDERED:

Appellee's Motion for Leave to File for Court to Amend Order (First) in the above captioned case is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON**, United States Air Force *Appellant*	)	No. ACM 40419 30 November 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 – General Court Martial Verbatim Transcript – *United States v. Technical Sergeant Matthew S. Henderson* (908 pages)

B. Appendix B – General Court Martial Verbatim Transcript (sealed portions) – *United States v. Technical Sergeant Matthew S. Henderson* (29 pages)

On 19 September 2023, this Court ordered the Government to prepare a verbatim transcript in this case. (*Order*, dated 19 September 2023). These appendices are responsive to the Court's order. The attached files comprise the unsealed and sealed portions of the verbatim transcript. Appendix A contains the unsealed portions of the transcript and is attached to this motion in electronic form. Since Appendix B contains sealed materials, it will only be delivered to the Court in hard-copy format.

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

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 motion was delivered to the Court via electronic mail on 30 November 2023. A copy of the motion and Appendix A were delivered to the Appellate Defense Division via electronic mail on the same date. Appendix B was hand-delivered in hard copy only to the Court.

KATE E. LEE, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force *Appellant*	)	No. ACM 40419 22 January 2024

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

Pursuant to Rule 23.3(m)(1), (2), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **29 March 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 137 days have elapsed. On the date requested, 204 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 20 clients are pending initial AOEs before this Court. Eleven matters have priority over this case:

1) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.
2) *United States v. Stafford*, ACM 40131 – The record of trial is 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel is preparing to petition the Court of Appeals for the Armed Forces (CAAF) for a grant of review in this case.
3) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

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

7) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States* v. *Petty*, ACM S32759 - The record of trial is three volumes consisting of fom prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 136 pages. Undersigned counsel has not yet begun reviewing the record of ti·ial in this case.

11) *United States* v. *Rodgers*, ACM 40528- The record of ti·ial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the ti·anscript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

WHEREFORE, Appellant respectfully requests that this Honorable Comt grant the requested first enlai·gement of time.

Respectfully submitted,

[redacted]

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

I ce1tify that the original and copies of the foregoing were sent via email to the Comt and served on the Government Trial and Appellate Operations Division on 22 Januaiy 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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24 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force *Appellant*	)	No. ACM 40419 19 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 a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 April 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 194 days have elapsed. On the date requested, 234 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 29 clients; 18 clients are pending initial AOEs before this Court. [1] Nine matters have priority over this case:

1) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to present oral argument to this Court as lead counsel in this case on 21 March 2024.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel began his review of the four volume record of trial in *U.S. v. Zhong*, ACM 40441; completed his review of the eight-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Patterson*, ACM 40426; prepared and filed both the AOE and a reply to the Government's answer in *U.S. v. Myers*, ACM S32749; petitioned the Court of Appeals for the Armed Forces (CAAF) for a grant of review and prepared and filed the supplement to the petition in *U.S. v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF; prepared and filed a reply to the Government's answer and prepared for oral argument, including conducting two practice oral arguments, in *U.S. v. Taylor*, ACM 40371; prepared and filed a nine-page motion and a nine-page response to a government motion in *U.S. v. Bartolome*, ACM 22045; prepared and filed a citation to supplemental authority with the CAAF in *U.S. v. Driskill*, ACM 39889 (f rev), USCA Dkt. No. 23-0066/AF; and participated in practice oral argument and preparation sessions for four additional cases. Additionally, counsel was heavily involved in the preparations for the Judge Advocate General's Corps 75th Anniversary Event, off for the Washington's Birthday holiday, and on leave on 7–11 March 2024.

2) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.

3) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has begun reviewing the record of trial in this case.

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

5) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States* v. *Petty*, ACM S32759 - The record of trial is three volumes consisting of fom prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 136 pages. Undersigned counsel has not yet begun reviewing the record of ti·ial, but additional counsel has been detailed to assist in this case.

9) *United States* v. *Rodgers*, ACM 40528- The record of ti·ial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the ti·anscript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

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

I ce1tify that the original and copies of the foregoing were sent via email to the Comt and served on the Government Trial and Appellate Operations Division on 19 March 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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20 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 March 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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force *Appellant*	)	No. ACM 40419 18 April 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 May 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 224 days have elapsed. On the date requested, 264 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has drafted the AOE in this case.
2) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has reviewed approximately ninety percent of the record of trial, including sealed materials, in this case.

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

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

4) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.

6) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 18 April 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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19 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 April 2024.

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	17 May 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 June 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 253 days have elapsed. On the date requested, 294 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

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

exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately thirty percent of the record of trial in this case.

3) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.

5) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

WHEREFORE, Appellant respectfully requests that this Honorable Comt grant the requested fomth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 17 May 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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20 May2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEWS. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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 Enor in this case.

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

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]
BRITTANY M. SPEIRS, Maj, USAFR
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

Appellant's case was docketed with this court on 7 September 2023. On 17 June 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 24th day of June, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **27 July 2024.**

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent *exceptional circumstances*.*

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

* The court notes the appellate defense counsel did not receive a verbatim transcript in this case until 30 November 2023, some 84 days after the case was docketed with this court. The court will take that matter under advisement as a potential component of "exceptional circumstances," but counsel are advised that this alone may not constitute "exceptional circumstances." Instead, in the event counsel find it necessary in the future to request an enlargement of time which would push the filing of any forthcoming assignment of errors beyond the 360-day mark since docketing, counsel should be prepared to articulate what, if any, *additional* factors may warrant such an enlargement.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	17 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 a fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 July 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 284 days have elapsed. On the date requested, 324 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

1) *United States v. Doroteo*, ACM 40363 – The record of trial is 14 volumes consisting of 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits; the transcript is 2,149 pages. Undersigned counsel was recently detailed to this case and is preparing to support oral argument before this Court on 18 June 2024 as well as assisting with the drafting a supplemental filing based on new post-trial disclosures.

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

2) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately ninety five percent of the record of trial and begun drafting the AOE in this case.
3) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has begun reviewing the record of trial in this case.
4) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.
5) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.
6) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has begun reviewing the record of trial in this case.
7) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 17 June 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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18 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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 324 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

Moreover, Appellant should be required to personally state his agreement or lack thereof to such a lengthy defense delay. *See* United States v. Moreno, 63 M.J. 129. 137 (C.A.A.F. 2006)("There is no evidence in this case that the numerous requests for delay filed by appellate

defense counsel benefited Moreno or that Moreno was consulted about and agreed to these delays.")

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 18 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, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	17 July 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 August 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 314 days have elapsed. On the date requested, 354 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 26 clients; 15 clients are pending initial AOEs before this Court. [1] Four matters have priority over this case:

1) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has reviewed approximately seventy percent of the record of trial in this case.
2) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has begun reviewing the record of trial in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial and prepared and filed a 45-page AOE in *U.S. v. Kershaw*, ACM 40455; sat as second chair for oral argument before this Court and filed both a 29-page supplemental brief and a 27-page reply to the government's answer based on new post-trial disclosures in *U.S. v. Doroteo*, ACM 40363; reviewed approximately sixty-five percent of the four-volume record of trial in *U.S. v. Cadavona*, ACM 40476; reviewed 578 pages of a verbatim transcript requiring certification; and participated in a practice oral argument for one additional case. Additionally, counsel was off for the Juneteenth and Independence Day holidays.

3) *United States* v. *Hughey*, ACM 40517 - The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has begun reviewing the record of trial in this case.

4) *United States* v. *Rodgers*, ACM 40528 - The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessru.y to allow counsel to fully review Appellant's case and advise Appellant regru.·ding potential enors. Appellant was info1med of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessru.y requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 17 July 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Email: frederick.johnson.1l l@us.af.mil

18 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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 July 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,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	16 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 September 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 344 days have elapsed. On the date requested, 384 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), dated 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, dated 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 23 clients; 14 clients are pending initial AOEs before this Court. [1] Two matters have priority over this case:

1) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has reviewed approximately twenty percent of the record of trial in this case.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately fifteen percent of the 14-volume record of trial in *U.S. v. Casillas*, ACM 40499; prepared and filed an 18-page reply to the government's answer in *U.S. v. Kershaw*, ACM 40455; prepared and filed a 12-page motion for leave to file supplemental brief and supplemental brief in *U.S. v. Doroteo*, ACM 40363; completed his review of the four-volume record of trial and prepared and filed a 28-page AOE in *U.S. v. Cadavona*, ACM 40476; and reviewed 279 pages of a verbatim transcript requiring certification.

On 24 June 2024, this Court issued an order stating that "any future requests for an enlargement of time that, if granted, would expire more than 360 days after docketing, will not be granted absent *exceptional circumstances*." Order, *United States v. Henderson*, No. ACM 40419, 24 June 2024. Since this motion for enlargement of time, if granted, would expire 384 after docketing, exceptional circumstances must be shown in accordance with the Court's order. The Court stated that the fact that appellate defense counsel did not receive a copy of the verbatim transcript until 84 days after the case was docketed would be taken under advisement as a potential component of exceptional circumstances. *Id.* However, the Court also advised counsel to articulate what, if any, additional factors may warrant the requested enlargement. *Id.*

Additional exceptional circumstances warranting an enlargement of time include the number of older cases on counsel's docket. Throughout the entire life of this case, undersigned counsel has been working diligently on cases that were docketed before Appellant's case. During that time, he has filed seven initial AOE briefs, four reply briefs, two supplemental briefs, one supplemental reply brief, one specified issue brief, and one motion to dismiss a petition, all before this Court. He has also filed five petitions for grant of review with associated supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Court, and sat as second chair for two additional oral arguments before this Court. He is currently reviewing the 14-volume record of trial, which includes a 1,957-page transcript, to prepare an initial AOE brief in *United States v. Casillas*, ACM 40499, another case that was docketed before Appellant's case.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under

Article 70, UCMJ, 10 U.S.C. § 870, on the day of his court-martial. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly and continually examines his docket, in concert with supervisory counsel within the Appellate Defense Division, to assess the possibility of assigning substitute counsel to expedite review of Appellant's case, but no such substitute counsel has been identified so far due to the Air Force Appellate Division's workload. Though subject to manual counting, as of 12 August 2024, the Division's records reflect 101 cases pending initial briefing before this Court; however, a comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the twenty-nine fewer cases now reflect thirty-four percent more pages for counsel to review. This volume of pending cases has arisen in part due to (i) the eighty percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 133 cases eligible for direct appeal forwarded to the Division's counsel versus 164 automatic appeals over that same time, (ii) the Division's robust practice before the United States Court of Appeals for the Armed Forces during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court, (iii) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, 10 U.S.C. § 862, and three writ-petitions under Article 6b, UCMJ, 10 U.S.C. § 806b, and (iv) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by

the Division's counsel, with each brief averaging three-to-four weeks of dedicated work to prepare in compliance with the Supreme Court's strict filing timelines.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the equivalent of the Division's active duty staffing steady at previously existing levels. In 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case.

The totality of these factors, including the 84 days between docketing and receipt of the verbatim transcript, undersigned counsel's diligent efforts on earlier-docketed cases over the life of Appellant's case, and the manning and workload challenges faced by the Appellate Defense Division throughout the life of Appellant's case, constitute exceptional circumstances that wanant granting the requested enlargement oftime. Cmcially, the fact that undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case is through *no fault of Appellant.* An enlargement of time is necessa1y to allow counsel to fully review Appellant's case and advise Appellant regarding potential enors. Appellant was info1med of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessa1y requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
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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 Comi and served on the Government Trial and Appellate Operations Division on 16 August 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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20 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

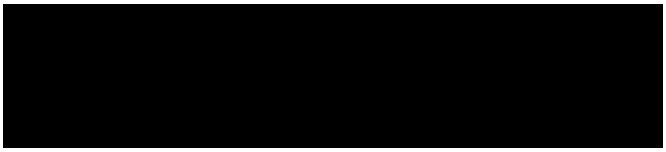
The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 384 days 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.

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

CERTIFICATE OF FILING AND SERVICE

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



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 September 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 23d day of September, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **25 October 2024.**

Any subsequent motions for enlargement of time will likely require a status conference with all assigned counsel prior to the court's ruling on any such motion.

Appellant's counsel are reminded that at the expiration of this enlargement of time, 330 days will have elapsed from the time Appellant received the verbatim trial transcript following docketing with this court (30 November 2023). Any future requests for enlargements of time that, if granted, would expire more than 360 days after Appellant's receipt of the verbatim trial transcript in this case will not be granted absent *exceptional circumstances*.

Counsel should come prepared to discuss and substantiate any qualifying exceptional circumstances during any future status conference ordered by the court.

[redacted]
OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	15 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 October 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, dated 30 November 2023. From the date of docketing to the present date, 374 days have elapsed. On the date requested, 414 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 24 clients; 15 clients are pending initial AOEs before this Court. [1] Four matters have priority over this case:

1) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has reviewed approximately seventy-five percent of the record of trial in this case.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to petition the United States Court of Appeals for the Armed Forces (CAAF) for a grant of review in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately fifty-five percent of the 14-volume record of trial and prepared and filed a motion for remand in *U.S. v. Casillas*, ACM 40499; reviewed approximately half of the eight-volume record of trial in *U.S. v. Rodgers*, ACM 40528; and began drafting the petition for grant of review and the supplement to the petition in *U.S. v. Taylor*, ACM 40371. Additionally, counsel was off for the Labor Day holiday and on leave on 13 September 2024.

3) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has reviewed approximately half of the record of trial in this case.

4) *United States v. Zhong*, ACM 40411 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the CAAF in this case.

On 24 June 2024, this Court issued an order stating that "any future requests for an enlargement of time that, if granted, would expire more than 360 days after docketing, will not be granted absent *exceptional circumstances*." Order, *United States v. Henderson*, No. ACM 40419, 24 June 2024. Since this motion for enlargement of time, if granted, would expire 414 days after docketing, exceptional circumstances must be shown in accordance with the Court's order. The Court stated that the fact that appellate defense counsel did not receive a copy of the verbatim transcript until 84 days after the case was docketed would be taken under advisement as a potential component of exceptional circumstances. *Id.* However, the Court also advised counsel to articulate what, if any, additional factors may warrant the requested enlargement. *Id.*

Additional exceptional circumstances warranting an enlargement of time include the number of older cases on counsel's docket. Throughout the entire life of this case, undersigned counsel has been working diligently on cases that were docketed before Appellant's case. During that time, he has filed seven initial AOE briefs, four reply briefs, two supplemental briefs, one supplemental reply brief, one specified issue brief, one motion to dismiss a petition, and one

motion for remand, all before this Court. He has also filed five petitions for grants of review with associated supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Court, and sat as second chair for two additional oral arguments before this Court. He is currently reviewing the 14-volume record of trial, which includes a 1,957-page transcript, to prepare an initial AOE brief in *United States v. Casillas*, ACM 40499, a case that was docketed before Appellant's case.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, 10 U.S.C. § 870, on the day of his court-martial. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly and continually examines his docket, in concert with supervisory counsel within the Appellate Defense Division, to assess the possibility of assigning substitute counsel to expedite review of Appellant's case, but no such substitute counsel has been identified so far due to the Air Force Appellate Defense Division's workload. Though subject to manual counting, as of 13 September 2024, the Division's records reflect 111 cases pending initial briefing before this Court; however, a comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the nineteen fewer cases now reflect fifty-two percent more pages for counsel to review. This volume of pending cases has arisen in part due to (i) the seventy-four percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for

Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 138 cases eligible for direct appeal forwarded to the Division's counsel versus 186 automatic appeals over that same time, (ii) the Division's robust practice before the United States Court of Appeals for the Armed Forces during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court, (iii) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, 10 U.S.C. § 862, and three writ-petitions under Article 6b, UCMJ, 10 U.S.C. § 806b, and (iv) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division's counsel, with each brief averaging three-to-four weeks of dedicated work to prepare in compliance with the Supreme Court's strict filing timelines.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the equivalent of the Division's active duty staffing steady at previously existing levels. In 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to

petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case.

The totality of these factors, including the 84 days between docketing and receipt of the verbatim transcript, undersigned counsel's diligent efforts on earlier-docketed cases over the life of Appellant's case, and the manning and workload challenges faced by the Appellate Defense Division throughout the life of Appellant's case, constitute exceptional circumstances that warrant granting the requested enlargement of time. Crucially, the fact that undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case is through *no fault of Appellant*. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 15 September 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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17 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

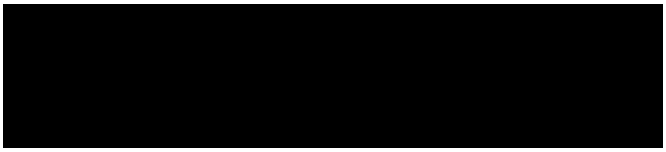
UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 414 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 three forth 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.

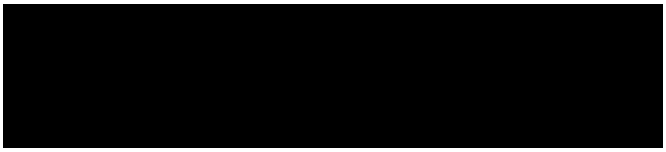
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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

CERTIFICATE OF FILING AND SERVICE

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



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 October 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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 21st day of October, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED.** Appellant shall file any assignments of error not later than **24 November 2024.**

Any subsequent motions for enlargement of time will likely require a status conference with all assigned counsel. Counsel should come prepared to discuss: **(1)** a precise status of their review of the record and progress in researching and drafting a potential assignment of errors brief; and (2) substantiate any qualifying exceptional circumstances.

Appellant's counsel are reminded that at the expiration of this enlargement of time, 360 days will have elapsed from the time that counsel received a copy of the verbatim transcript of this case after the case was docketed with the court. Any futlu-e requests for enlargements of time to extend the filing deadline beyond 360 days after docketing or receipt of a verbatim transcript (whichever is later) ordinarily will *not* be granted absent *exceptional circumstances.*

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	15 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 November 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, 30 November 2023. From the date of docketing to the present date, 404 days have elapsed. On the date requested, 444 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of

Trial Results (STR), 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 14 clients are pending initial AOEs before this Court. [1] This case is undersigned counsel's highest priority among cases pending initial AOEs before this court, but three additional matters have priority over it:

1) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has petitioned the CAAF for grant of review and drafted the supplement to the petition in this case.
2) *United States v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial and prepared and filed a merits brief in *U.S. v. Rodgers*, ACM 40528; petitioned the United States Court of Appeals for the Armed Forces (CAAF) for a grant of review and drafted a 27-page supplement to the petition in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed an eight-page supplemental reply brief in *U.S. v. Doroteo*, ACM 40363; petitioned the CAAF for a grant of review in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; and reviewed approximately five percent of the 14-volume record of trial in *U.S. v. Casillas*, ACM 40499. Additionally, counsel was off for the Columbus Day holiday, was on leave on 17–25 September 2024, and attended the Joint Appellate Advocacy Training on 26–27 September 2024.

exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has petitioned the CAAF for grant of review and is drafting the supplement to the petition in this case.

3) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.[2] Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

[2] In its most recent order in this case, this Court stated that "[a]ny future requests for an enlargement of time that, if granted, would expire more than 360 days after Appellant's receipt of the verbatim trial transcript in this case will not be granted absent *exceptional circumstances*." Order, *United States v. Henderson*, No. ACM 40419, 23 September 2024. This order seemingly superseded a similar order that previously stated that "any future requests for an enlargement of time that, if granted, would expire more than 360 days after docketing, will not be granted absent *exceptional circumstances*." Order, *United States v. Henderson*, No. ACM 40419, 24 June 2024. Since this request for a ninth enlargement of time, if granted, would expire 360 days after Appellant's receipt of the verbatim trial transcript, this motion does not address any exceptional circumstances, in accordance with the Court's most recent order. Order, *United States v. Henderson*, No. ACM 40419, 23 September 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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Joint Base Andrews NAF, MD 20762-6604
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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 Comi and served on the Government Trial and Appellate Operations Division on 15 October 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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17 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly yearlong delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed three forth of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant*.	)	No. ACM 40419
	)	4 November 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Technical Sergeant Matthew S. Henderson, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Appellate Exhibits VI, XII, XIII, XIV, and XV; PHO Exhibits 4, 5, 6, 7, 10, 11, 12, 13, 14, and the closed session contained in PHO Exhibit 19; and transcript pages 179–207 in Appellant's record of trial.

Facts

On 26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 30 June 2022. The military judge also acquitted Appellant of several additional charges and specifications, including one specification of abusive sexual contact under Article 120, UCMJ, 10 U.S.C. § 920. R. at 907; EOJ. In the course of the proceedings, trial defense counsel filed a motion to admit evidence under Mil. R. Evid. 412, and both the trial counsel and victim's counsel

subsequently filed responses. App. Ex. XII, XIII, XIV. The military judge heard arguments regarding this motion during a closed Article 39(a), UCMJ, session. R. at 178. The military judge ordered that the filings related to this motion, which consist of Appellate Exhibits VI, XII, XIII, XIV, and XV, be sealed. R. at 208, 216. Additionally, the Preliminary Hearing Officer (PHO) ordered PHO Exhibits 4, 5, 6, 7, 10, 11, 12, 13, 14 sealed, along with the closed session contained in PHO exhibit 19. Preliminary Hearing Report, 6 October 2021.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

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

counsel belongs.[1]

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

Analysis

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

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

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

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

record of trial.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.ll@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I ce1tify that the original and copies of the foregoing were sent via email to the Comt and served on the Government Trial and Appellate Operations Division on 4 November 2024.

Respectfully submitted,

[redacted]

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

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 November 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, specifically, transcript pages 179–207, which pertain to a closed hearing; and Appellate Exhibits VI and XII–XV related to the same hearing; and preliminary hearing officer (PHO) Exhibits 4–7, 10–14, and 19, pertaining to the same subject matter. All requested items were reviewed by trial and defense counsel at Appellant's court-martial or preliminary hearing. The United States consented to Appellant's motion.

Appellate defense counsel argues it is necessary to review the entire record, including the sealed materials, to ensure undersigned counsel provides "competent appellate representation." (Citation omitted). Appellate defense counsel further explains that examination of the sealed materials is reasonably necessary "to competently conduct a professional evaluation of Appellant's case and uncover all issues which might afford him relief."

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

The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is reasonably necessary to fulfill counsel's duties of representation to Appellant. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 13th day of November, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **trial transcript pages 179–207; Appellate Exhibits VI and XII–XV; and PHO Exhibits 4–7, 10–14, and 19,** subject to the following conditions:

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

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew S. HENDERSON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 14 November 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 26 days to submit Appellant's assignments of error. The Government opposes the motion.

In his motion, Appellant's counsel asserts that while he has completed review of approximately 90% of the record for Appellant's case, he will not be able to complete his review and forthcoming brief in lieu of exceptional circumstances. He asserts the following constitute exceptional circumstances: (1) a denial by a separate panel of this court of the same counsel's request for an enlargement of time for that case*; and (2) appellate defense counsel's other assigned duties have prevented him from completing review of Appellant's record of trial and drafting a brief in Appellant's case.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. While generally the court is not convinced that the routine duties involved with managing caseload constitute exceptional circumstances, here we nonetheless find good cause to grant Appellant's motion insofar as Appellate defense counsel have demonstrated substantial progress in reviewing Appellant's case, and we anticipate that this 26-day enlargement of time will be the final enlargement of time.

Accordingly, it is by the court on this 21st day of November, 2024,

ORDERED:

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

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* On 13 November 2024, Panel 2 of this court denied appellate defense counsel's request for a fifth enlargement of time in *United States v. York*, ACM 40419.

Any subsequent motions for enlargement of time will likely require a status conference with all assigned counsel prior to the court's ruling on any such motion.

Appellant's counsel are reminded that at the expiration of this enla1·gement of time, 386 days will have elapsed from Appellant's defense counsel's receipt of the record of trail following the docketing of Appellant's case with this court. Any future requests for enlargements of time will likely not be granted absent *exceptional circumstances.* Counsel should come prepared to discuss and substantiate any qualifying exceptional circumstances during any future status conference ordered by the court.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant.*	)	No. ACM 40419
	)	14 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 26 days, which will end on **20 December 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, 19 September 2023. Counsel received a copy of the certified verbatim transcript on 30 November 2023. United States' Motion to Attach Documents, 30 November 2023. From the date of docketing to the present date, 434 days have elapsed. On the date requested, 470 days will have elapsed. From the date of receipt of a verbatim transcript to when this enlargement of time, if granted, would end, 386 days will have elapsed.

On 4 April 2022 and 23–26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, found Appellant guilty, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 907; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 30 June 2022. The military judge sentenced Appellant to be reprimanded, to be

reduced to the grade of E-4, to forfeit $1,000 pay per month for two months, and to perform hard labor without confinement for 30 days. R. at 937; ROT Vol. 1, Statement of Trial Results (STR), 26 May 2022. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Matthew S. Henderson*, 22 June 2022.

The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Appellant is not currently confined. Undersigned counsel has reviewed approximately ninety percent of the record of trial in this case.

Counsel is currently representing 29 clients; 16 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF).[1] Two matters currently have priority over this case:

1) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel has reviewed approximately

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 27-page supplement to the petition for grant of review to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed a 31-page supplement to the petition for grant of review to the CAAF in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; petitioned the CAAF for a grant of review and prepared and filed a 20-page supplement to the petition in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; prepared and filed a 15-page reply brief in *U.S. v. Cadavona*, ACM 40476; prepared and filed a thirteen-page brief on behalf of appellant following redocketing in *U.S. v. Kershaw*, ACM 40455; reviewed approximately ninety percent of the five-volume record of trial in this case; prepared and filed a five-page response to the Government's motion for reconsideration in *U.S. v. Patterson*, ACM 40426; reviewed approximately sixty percent of the seven-volume record of trial in *U.S. v. York*, ACM 40604; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the Veterans Day holiday and was on leave on 18–20 October 2024.

thirty-five percent of the record of trial in this case. The AOE in this case is currently due on 19 November 2024, and because this Court denied the appellant's fifth request for an enlargement of time, undersigned counsel must prepare and file the AOE by that date.

2) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages. Undersigned counsel was recently detailed to this case and is now reviewing the record and drafting a grant brief to the CAAF.

On 21 October 2024, this Court issued an order stating, "Any future requests for enlargements of time to extend the filing deadline beyond 360 days after docketing or receipt of a verbatim transcript (whichever is later) ordinarily will *not* be granted absent *exceptional circumstances*." Order, *United States v. Henderson*, No. ACM 40419, 21 October 2024. Since this motion for enlargement of time, if granted, would expire 470 days after docketing and 386 days after receipt of a verbatim transcript, exceptional circumstances must be shown in accordance with this Court's order.

In this instance, exceptional circumstances arose from an order from this Court in another case to which undersigned counsel is detailed. Undersigned counsel has reviewed approximately ninety percent of Appellant's record of trial, including all unsealed exhibits, and anticipated filing an AOE brief on behalf of Appellant not later than the current deadline of 24 November 2024. However, on 13 November 2024, this Court issued an order denying the appellant's request for a fifth enlargement of time in *United States v. York*, a case that was docketed after Appellant's case and in which 205 days have elapsed since the receipt of a verbatim transcript. Order, *United States*

v. York, No. ACM 40604, 13 November 2024. The current due date in *York* is 19 November 2024. To comply with this Court's order and file and AOE brief by that date, undersigned counsel had to immediately suspend work on all other duties and focus exclusively on reviewing the seven-volume record of trial in that case. This reprioritization resulting from the Court's order in *York* constitutes exceptional circumstances that warrant granting an enlargement of time.

In addition to filing an AOE brief in *York*, undersigned counsel must fulfill duties which cannot reasonably be suspended or further delayed. Counsel will travel to sit as second chair during oral arguments before this Court in *United States v. Menard*, ACM 40496, at the University of Oklahoma School of Law on 19 November 2024. Counsel must travel on the days before and after argument due to commercial flight schedules and needs to spend time preparing with his co-counsel for this argument. Counsel consulted with division leadership, who confirmed that no alternate counsel is available to support this outreach oral argument. Additionally, counsel must complete his review of the nine-volume record of trial and prepare and file a grant brief with the CAAF by 6 December 2024 in *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF. Counsel was detailed to this case within the past month and has already received an extension of time from the CAAF to file this brief. The requested 26-day enlargement of time will ensure undersigned counsel has sufficient time in light of these other requirements to complete his review of Appellant's record and prepare and file an AOE brief.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. This is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008). Throughout the entire life of this case, undersigned counsel has been working diligently on cases

that were docketed before Appellant's case. Dming that time, he has filed seven initial AOE briefs, one merits brief, five reply briefs, two supplemental briefs, two supplemental reply briefs, one specified issue brief, one motion to dismiss a petition, one motion for remand, and one additional brief following redocketing, all before this Comt. He has also filed eight petitions for grant of review and eight petition supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Comt, and sat as second chair for two additional oral arguments before this Comt. Despite these diligent effo1ts, exceptional circumstances make an enlargement oftime necessa1y to allow counsel to fully review Appellant's case and advise Appellant regarding potential e1Tors. Appellant was info1med of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessa1y requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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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 Comi and served on the Government Trial and Appellate Operations Division on 14 November 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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18 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MATTHEW S. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40419 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 386 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed three forth of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
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 November 2024.

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

UNITED STATES, *Appellee*, v. Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 3 No. ACM 40419 19 December 2024

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

Assignments of Error

I.

Whether the findings of guilty are legally and factually sufficient where the evidence does not prove what the regulation at issue said throughout the charged timeframe and the conduct identified in the special findings was not severe enough to violate the regulation in the ways the specifications detailed.

II.

Whether the Government can prove 18 U.S.C. § 922 is constitutional as applied to Technical Sergeant Henderson when he was convicted of offenses that do not fall within the nation's historical tradition of firearm regulation.

Statement of the Case

On 26 May 2022, a military judge sitting as a general court-martial at Eielson Air Force Base, Alaska, convicted Appellant, Technical Sergeant (TSgt) Matthew Henderson, contrary to his pleas, of one charge and two specifications of violating a lawful general regulation in violation of Article 92, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 892. R. at 907. The

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

military judge sentenced TSgt Henderson to a reprimand, reduction to the grade of E-4, forfeiture of $1,000 pay per month for two months, and hard labor without confinement for 30 days. R. at 937. The convening authority took no action on the findings but reduced the sentence of hard labor without confinement to ten days and disapproved the adjudged forfeitures of pay. Convening Authority Decision on Action, 22 June 2022.

Statement of Facts

TSgt Henderson served as an instructor for technical training at Sheppard Air Force Base, Texas, between 2016 and 2020. Pros. Ex. 10 at 3–11. After he moved to a new base, allegations emerged that he had acted inappropriately towards some of his students in the fall of 2019. One of his former students, A.M., alleged that he asked her when she was going to let him "hit" or "smash," terms which she understood as references to having sex. R. at 303. Another former student, D.O., recalled asking him if she could sit out of a training activity, to which he allegedly responded, "Yes, if you sit on my face." R. at 347. Both of these incidents purportedly occurred in the hangar during Phase II of the training. R. at 301–02, 319, 346, 368. Phase II lasted two or three months, and both A.M. and D.O. completed it in December 2019. R. at 301, 306, 346.

Based on these allegations, the Government charged TSgt Henderson with two specifications of violating Air Force Instruction (AFI) 36-2909, *Air Force Professional Relationships and Conduct*. DD Form 458, *Charge Sheet*, 1 September 2021. The two specifications both alleged he violated paragraph 4.2.1 of this regulation between on or about 1 October 2019 and 31 December 2019. *Id.* The first specification alleged that he wrongfully attempted to develop a sexual relationship with an unidentified trainee while in the position of entry level trainer, while the second accused him of wrongfully making sexual advances towards D.O. *Id.* Neither specification stated what conduct allegedly constituted these offenses. *Id.*

At trial, the court admitted an excerpt from AFI 36-2909 dated 14 November 2019. R. at 268–69; Pros. Ex. 1. The military judge made special findings indicating that he found TSgt Henderson guilty of the first specification for the comment to A.M. about hitting or smashing and found him guilty of the second specification for the comment to D.O. about sitting on his face. R. at 907.

Additional facts are included *infra* as necessary.

Argument

I.

The findings of guilty are legally and factually insufficient because the evidence does not prove what the regulation at issue said throughout the charged timeframe and the conduct identified in the special findings was not severe enough to violate the regulation in the ways the specifications detailed.

Standard of Review

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

Law and Analysis

The guilty findings are legally and factually insufficient because the evidence does not prove that the convicted acts violated the regulation at the times they occurred and those acts do not rise to the level of the charged violations. This Court "may affirm only such findings of guilty . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). The test for factual sufficiency is "whether, after

weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." [2] *Rosario*, 76 M.J. at 117 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)).

A. The Government failed to prove that the regulation in question prohibited the charged conduct at the times of the alleged offenses.

The evidence presented only established what conduct the instruction at issue regulated after it took effect on 14 November 2019. But the conduct of which TSgt Henderson was convicted was introduced as occurring up to six weeks either before or after that regulation took effect: between on or about 1 October 2019 and 31 December 2019. Since the conduct occurred at unknown points within the charged timeframe and the evidence of the regulation did not cover that whole timeframe, the Government did not prove that TSgt Henderson's conduct violated the regulation because it failed to prove what the regulation said at the time the conduct occurred. Thus, his convictions for violating a lawful general regulation are legally and factually insufficient.

1. The military judge found the offenses occurred within the charged timeframe, and the record does not support a more specific finding.

The two specifications for which the court-martial convicted TSgt Henderson included the same charged timeframe: "between on or about 1 October 2019 and 31 December 2019." DD Form 458, *Charge Sheet*, 1 September 2021. The court-martial's findings did not alter this timeframe, so it convicted TSgt Henderson of committing the offenses in the timeframe charged. R. at 907. The military judge did make special findings that specified what conduct formed the

[2] Since TSgt Henderson's convictions are for offenses that occurred in 2019, the factual sufficiency review standards in effect before 1 January 2021 apply here. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (e)(2), 134 Stat. 3388, 3612–13 (2021).

basis for the guilty findings. *Id.* For each specification, the military judge's findings identified one instance for which he found TSgt Henderson guilty. *Id.* Although these special findings clarified the actions for which TSgt Henderson was found guilty, they did not provide more specificity than the charged timeframe as to when the court-martial found these actions occurred. *Id.*

The evidence in the record does not support narrowing the charged timeframe for either specification. A.M. testified that TSgt Henderson made the convicted comment—"when will you let me hit or smash"—while he was her instructor. R. at 303. She did not recall the date he made that comment, but she did recall that they were in the hangar working on jets. R. at 313, 319. TSgt Henderson was A.M.'s instructor for Phase II of her training, the second of two phases and the one in which students get hands on training with aircraft and equipment. R. at 301–02. A.M. did not remember approximate dates for when she was in Phase II but estimated it lasted about two or three months in the fall of 2019. R. at 301. She graduated in December 2019 before the Christmas holiday. R. at 306. If TSgt Henderson made this comment when he was her instructor, it would have been while she was in Phase II, which was a period of approximately two or three months before she graduated in December 2019. This roughly aligns with the charged timeframe of between on or about 1 October 2019 and 31 December 2019, but it is not more specific than that.

Similarly, D.O. had TSgt Henderson as her Phase II instructor, and she graduated in December of 2019. R. at 346. She testified that he made the convicted comment—"Yes, if you sit on my face"—in the hangar during class time. R. at 347, 364, 368. She did not provide any additional testimony about when it occurred, meaning it would have been sometime within the two or three months before her graduation in December 2019. As with A.M., this generally aligns with

the charged timeframe but is not more specific.

The court-martial found TSgt Henderson guilty of committing the two convicted offenses within the charged timeframe, and while the evidence is generally consistent with that timeframe, it does not support narrowing it. The record does not indicate when within this timeframe the court-martial found TSgt Henderson committed these offenses. Moreover, the only two witnesses who testified about the convicted acts could not provide any more specificity regarding when they occurred. R. at 313, 364. Thus, the alleged conduct could have reasonably occurred at any time within the charged timeframe.

2. The evidence does not prove what the regulation in question said throughout the entire charged timeframe.

Although the evidence did not support a more specific determination of when the offenses occurred within the charged timeframe, the Government only introduced evidence of the contents of the regulation at issue for approximately half of this timeframe. To prove the offense of violating a lawful general regulation under Article 92(1), UCMJ, 10 U.S.C. § 892(1), the Government had to prove three elements: (1) that there was a lawful general regulation, specifically AFI 36-2909, in effect; (2) that TSgt Henderson had a duty to obey it; and (3) that TSgt Henderson violated the regulation. *2019 MCM*, Part IV, ¶ 18(b)(1); DD Form 458, *Charge Sheet*, 1 September 2021. To meet the first element, "it must be proven that the regulation in question existed at the date and time of the alleged violation." *United States v. Williams*, 3 M.J. 155, 156 (C.M.A. 1977). This requires the Government to introduce the regulation into evidence or request that the military judge take judicial notice of it. *Id.* ("Clearly then, the government must introduce into evidence the specific regulation which breathes life into Article 92(1) to successfully prosecute any alleged violation.")

Here, the Government introduced an excerpt from the regulation in question, AFI 36-2909,

into evidence. Pros. Ex. 1. But the version of the regulation in evidence only took effect on 14 November 2019, approximately halfway through the charged timeframe. Pros. Ex. 1; R. at 268. Although the excerpt indicates there was a previous version of the regulation, there is no evidence establishing what this regulation said before that date. *Id.* The trial counsel seemingly acknowledged that limitation when offering the exhibit, asking "the court to take judicial notice under MRE 201 of the existence of those Air Force Instructions, *at the time listed on the exhibits*."[3] R. at 269 (emphasis added). The military judge stated he would take judicial notice of the excerpt. *Id.* There is no evidence of the contents of this regulation before the date shown on Pros. Ex. 1.

Since there is no evidence of what AFI 36-2909 said before 14 November 2019, there is no evidence that this regulation prohibited the alleged conduct for the first half of the charged timeframe, which began on or about 1 October 2019. Yet TSgt Henderson stands convicted of violating this regulation on two occasions within the charged timeframe. The court-martial did not specify when it found he violated the regulation within this timeframe, and the evidence does not permit a finding with more specificity. Therefore, there is an incontrovertible possibility that the convicted acts occurred at a time for which there is no evidence of the regulation's contents. This makes TSgt Henderson's convictions for violating a lawful general regulation legally and factually insufficient.

"[I]n reviewing the legal and factual sufficiency of the evidence, a [Court of Criminal Appeals] may consider only admitted evidence found in the record of trial." *United States v. Jessie*, 79 M.J. 437, 440 n.6 (C.A.A.F. 2020). When considering only admitted evidence, no rational trier of fact could find the essential elements of the convicted offenses beyond a reasonable

[3] The excerpt from AFI 36-2909 was introduced alongside an excerpt from another regulation that was relevant to a specification of which TSgt Henderson was ultimately acquitted. R. at 268–69.

doubt because they could not know whether the regulation in question prohibited the conduct at the time it occurred. This makes the findings of guilty legally insufficient. *Robinson*, 77 M.J. at 297–98. Likewise, the members of this Court should not themselves be convinced of TSgt Henderson's guilt beyond a reasonable doubt because they cannot be sure, based on the evidence, that TSgt Henderson's conduct violated the regulation at the time of the conduct. The findings are therefore factually insufficient as well. *Rosario*, 76 M.J. at 117.

B. The specific instances on which the convictions are based are insufficient to prove an attempt to establish a sexual relationship and a sexual advance.

Even if the evidence could establish what the regulation in question prohibited at the times of the offenses, the convictions are still legally and factually insufficient because the conduct does not rise to the level of the violations alleged in the specifications. The Government's charging scheme and the military judge's special findings narrowed the conduct that could form the bases for TSgt Henerson's convictions. The Government must prove the facts it chooses to allege on the charge sheet. *United States v. English*, 79 M.J. 166, 120 (C.A.A.F. 2019). Here, it chose to allege that TSgt Henderson violated AFI 36-2909 by wrongfully attempting to develop a sexual relationship with one trainee and wrongfully making sexual advances towards another. DD Form 458, *Charge Sheet*, 1 September 2021. Even if the conduct at issue might violate the regulation in other ways or be otherwise inappropriate, the Government had to prove these particular violations as alleged in the specifications.

The military judge's special findings clearly indicated what conduct was the basis for each guilty finding. The finding for the first specification is based on TSgt Henderson's comment to A.M., when he allegedly asked, "When will you let me hit or smash?" R. at 907. His comment to D.O. where he allegedly said, "Yes, if you sit on my face," was the basis for the findings on the second specification. *Id.* Because of the special findings, the two discrete instances alone must

violate the regulation in the manners alleged to sustain the convictions.

Although generally inappropriate, the two comments do not rise to the levels of the alleged regulation violations. The first comment is too ambiguous to constitute an attempt to develop a sexual relationship with a trainee. A.M. testified that he asked when she was going to let him "hit" or "smash," and while she apparently understood the question to be a reference to having sex, either word could have other meanings. R. at 303. According to A.M.'s account, TSgt Henderson did not state what or who he wanted to hit or smash, the comment came in the aircraft hangar during class, and there was no associated misconduct at the time of the statement. R. at 303, 319. None of that is consistent with a legitimate attempt to develop a sexual relationship with a trainee.

This comment is far less incriminating than the conduct in *United States v. Da Silva*, where this Court sustained convictions for violating a lawful general regulation by making sexual advances towards trainees. No. ACM 39599, 2020 CCA LEXIS 213, at *38–42 (A.F. Ct. Crim. App. Jun. 25, 2020). The appellant in *Da Silva* made sexual advances on one trainee by taking her to an isolated location, telling her she had a nice body and was too pretty to be with her husband, and kissed her. *Id.* at *38. That appellant made sexual advances on another trainee by isolating her in a vehicle, stating he wanted to "bang her," grabbing her hand, touching her hair, and trying to convince her to have sex with him before she left for basic military training. *Id.* at *40–41.

The conduct in *Da Silva* stands in stark contrast from a single, ambiguous comment, made in a hangar while the rest of the class was present and working on jets. R. at 319. The one comment alone is not enough for a rational trier of fact, or the members of this Court, to be convinced beyond a reasonable doubt that TSgt Henderson wrongfully attempted to develop a sexual relationship with A.M. But that comment is the sole basis for the conviction. This conviction is legally and factually insufficient.

Similarly, the comment to D.O. falls short of constituting a sexual advance. It is not realistic to conclude that TSgt Henderson actually wanted D.O. to sit on his face when he purportedly made this comment in a hangar with other people around. R. at 364–65. This comment is much less severe than the words and conduct that constituted sexual advances in *Da Silva*, 2020 CCA LEXIS 213, at *38–42. Unlike that case, there was no touching, and TSgt Henderson did not isolate D.O. However inappropriate the comment may have been, it was not clearly a sexual advance and could have been a tasteless joke. A rational trier of fact and the members of this Court cannot be convinced beyond a reasonable doubt that the comment alone constituted a sexual advance towards D.O. Because the conviction on the second specification is for this comment alone, that conviction is legally and factually insufficient.

WHEREFORE, TSgt Henderson respectfully requests this Honorable Court set aside the findings of guilty and the sentence and dismiss the remaining Charge and its Specifications with prejudice.

II.

The government cannot prove 18 U.S.C. § 922 is constitutional as applied to Technical Sergeant Henderson because he was convicted of offenses that do not fall within the nation's historical tradition of firearm regulation.

Additional Facts

The First Indorsements to both the Entry of Judgment (EOJ) and Statement of Trial Results (STR) state that TSgt Henderson is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgment, 30 June 2022; Statement of Trial Results, 26 May 2022.

Standard of Review

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

Law and Analysis

A. Section 922 is unconstitutional as applied to TSgt Henderson.

The test for applying the Second Amendment is as follows:

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

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (quoting *United States v. Konigsberg*, 366 U.S. 36, 50, n.10 (1961)).

Although the annotation that Section 922 applies to the case is vague, the Government presumably intended to apply Section 922(g)(1), which bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to TSgt Henderson, who stands convicted of offenses that have historically not merited firearms restrictions. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter the convicted offense, as long as the punishment could exceed one year of confinement. Regardless of the type or severity of an offense, all would be painted with the same brush. This the Government cannot show.

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

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

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701, 704 (quoting 1926 Uniform Firearms Act §§ 1, 4). A "crime of violence" meant "committing or attempting to commit 'murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking.'" *Id.* at 701 (quoting 1926 Uniform Firearms Act § 1). The offenses of which TSgt Henderson was convicted fall short of these. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit adopted this logic to conclude that Section 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' imprisonment. *Range v. AG United States*, 69 F.4th 96, 98 (3d Cir. 2023), *vacated*, 144 S. Ct. 2706 (2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024)). Evaluating Section 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. The real question, then, is whether TSgt

Henderson's convictions meet the historical tradition of regulating firearms based on a limited framing of "violent."

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

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

Marshall, *supra,* at 697. Notably, the "federal 'felon' disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [64] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

All the arguments above demonstrate that violation of a lawful general regulation does not qualify for a lifetime ban on firearms. The recent case of *United States v. Rahimi* does not change the analysis. 602 U.S. 680 . In *Rahimi,* the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. *Id.* at 699. The Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 698.

But the historical analogue breaks down when applied here. In *Rahimi,* the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a

particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 699. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, this case did not involve a threat with a weapon, and the firearms ban will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding. As the Supreme Court stated, "We conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 702. Such a narrow holding cannot support the broad restriction encompassed here.

B. This Court may order correction of the First Indorsement to the Entry of Judgment under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

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

The CAAF determined that changing the STR back was an ultra vires act by the Army Court because "the STR is not part of the findings or sentence," but rather "other information" required by R.C.M. 1101(a)(6). *Id*. at *12-13. Therefore, the Army Court did not have authority

to act pursuant to Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018),[4] in this way. *Id.*

The CAAF then analyzed whether the Army Court had the authority to change the firearm ban under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), as an "error . . . in the processing of the court-martial after the judgment was entered into the record." *Id*. at *13. The CAAF concluded that Article 66(d)(2) did not apply for three reasons related to the unique facts of that case. *Id*. at *14-15. First, there was no "error" because the military judge corrected any erroneous notation on the STR before signing the judgment. *Id*. at *14. Thus, by the plain language of the statute, there was no error to consider after the EOJ. Second, assuming error, the burden of raising such error was on the accused. *Id*. As the appellant in *Williams* agreed with the military judge's action in correcting the firearm notation, no error was raised. *Id*. Therefore, the Army Court's "correction authority" had not been "triggered," as the appellant never raised the firearm notation as an error. Third, assuming error and assuming the error had been raised, the timing of the military judge's erroneous notation preceded the EOJ; it was on the STR. *Id*. Therefore, based on the plain language of Article 66(d)(2), UCMJ, it was not an error occurring *after* the EOJ. *Id.*

The CAAF did not foreclose properly raising an erroneous firearm notation to the service courts of appeal under Article 66(d)(2), UCMJ, when the error raised occurs *after* the EOJ, as in TSgt Henderson's case.[5] Unlike the appellant in *Williams*, TSgt Henderson meets the factual

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

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

predicate to trigger this Court's review under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

First, TSgt Henderson "demonstrated error" in his case—that he was erroneously and unconstitutionally deprived of his right to bear arms. In demonstrating this error, TSgt Henderson seeks correction of the EOJ, which includes the First Indorsement with the erroneous firearm bar.

This requested remedy is in line with *Williams*. While this Court cannot correct the erroneous firearms bar associated with the STR, it *can* correct the erroneous firearm notation on the First Indorsement attached to the EOJ, which was completed *after* the EOJ during post-trial processing. *Williams*, ___M.J. _, 2024 CAAF LEXIS 501, at *14-15; *see also infra* (discussing timing in detail). Unlike the appellant in *Williams*, there is an error raised and demonstrated by TSgt Henderson for this Court to consider under Article 66(d)(2), UCMJ.

Second, the error on the First Indorsement erroneously depriving TSgt Henderson of his constitutional right to a firearm was an error in the "processing of the court-martial after the judgment was entered into the record under section 860(c) . . . (article 60(c))." Article 66(d)(2), UCMJ. Under the applicable Air Force regulation, "*[a]fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* ¶ 20.41 (Apr. 14, 2022) (emphasis added). The firearm denotation on the First Indorsement that accompanies the EOJ into the record of trial explicitly happens *after* the EOJ is signed by the military judge pursuant to Article 60(c), UCMJ. *Id.* Additionally, as this First Indorsement is the most recent notification to law enforcement entities about the applicability of 18 U.S.C. § 922 to TSgt Henderson, it makes sense that this is the document the Court should review for post-trial processing error. *See id.* at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ

and attachments). Therefore, unlike the issue addressed in *Williams*, the error here occurred after the EOJ, in accordance with the last triggering criterion under Article 66(d)(2), UCMJ.

Finally, this Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is not foreclosed by this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671 (A.F. Ct. Crim. App. 2024). In *Vanzant*, this Court determined it did not have authority to act on collateral consequences not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id*. at 680 ("Article 66(d), UCMJ, provides that a [Court of Criminal Appeals] 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The CAAF agreed with this interpretation. *Williams*, __M.J. __, 2024 CAAF LEXIS 501, at *11-13. However, TSgt Henderson is asking this Court to review an error in post-trial processing under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See* 84 M.J.at 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)). To effectuate any remedy, this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction, as, ultimately, the First Indorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects TSgt Henderson's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

WHEREFORE, TSgt Henerson respectfully requests that this Court hold 18 U.S.C. § 922 is unconstitutional as applied to him and order correction of the First Indorsement to the EOJ, pursuant to its authority under Article 66(d)(2), UCMJ.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 19 December 2024.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **Matthew S. Henderson** United States Air Force *Appellant.*	)	No. ACM 40419
	)	9 January 25

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 6-day enlargement of time, to respond in the above captioned case. This case was docketed with the Court on 7 September 2023. Since docketing, Appellant has been granted ten enlargements of time. Appellant filed his brief with this Court on 19 December 2024. This is the United States' first request for an enlargement of time. As of the date of this request, 490 days have elapsed. The United States' response in this case is currently due on 18 January 2025, which would make the actual due date 21 January, based on the weekend and federal holiday. If the enlargement of time is granted the United States' response will be due on 24 January 2025, and 505 days will have elapsed since docketing.

Undersigned counsel is currently working on the United States' Answer for United States v. Navarro-Aguirre, USCA Dkt. No. 24-0146/AF, due on 10 January 2025 to the Court of Appeals for the Armed Forces. As a result, undersigned counsel has not started working on the above-captioned brief. However, the case will be undersigned counsel's first priority after Navarro-Aguirre is filed. 17 January 2025 is a Family Day and 20 January 2025 is a Federal

Holiday. Given undersigned counsel's workload and upcoming Federal Holiday and Family Day, a 6-day enlargement of time is warranted and would extend the actual due date by only 4 days.

There is no other appellate government counsel who would be able to file a brief sooner because they are also assigned extensive briefs. The Air Force Appellate Operations Division (JAJG) has had a heavy workload since Appellant's brief was filed. In between 19 December 2024 and 18 January 2025, JAJG will have filed 5 CAAF Final Answer briefs, 2 CAAF Answers to Supplements to Petitions for Grant of Review, 1 TJAG certification, 5 AFCCA Assignments of Error briefs, 2 AFCCA motions for reconsideration, and many other miscellaneous filings. JAJG has also held multiple moot courts to prepare for two CAAF oral arguments. In light of the above, a 6-day enlargement of time would be reasonable to allow undersigned counsel to prepare a through and responsive brief and to secure supervisory review.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ANSWER TO**
Appellee,	)	**ASSIGNMENTS OF ERROR**
	)	
v.	)	Before Panel No. 3
	)	
Technical Sergeant (E-6)	)	No. ACM 40419
MATTHEW S. HENDERSON	)	
United States Air Force	)	24 January 2025
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILTY ARE LEGALLY AND FACTUALLY SUFFICIENT WHERE THE EVIDENCE DOES NOT PROVE WHAT THE REGULATION AT ISSUE SAID THROUGHOUT THE CHARGED TIMEFRAME AND THE CONDUCT IDENTIFIED IN THE SPECIAL FINDINGS WAS NOT SEVERE ENOUGH TO VIOLATE THE REGULATION IN THE WAYS THE SPECIFICATIONS DETAILED.

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT WHEN HE WAS CONVICTED OF OFFENSES THAT DO NOT FALL WITHIN THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case. Appellant received Article 65(d), UCMJ review on 2 November 2022. (ROT, Vol. 1.) Thus, Appellant's court-martial was final under Article 57(c)(1), UCMJ, before the 23 December 2022 change to Article 66, UCMJ, that would purportedly give this Court jurisdiction over his court-martial. *See* Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022). The United States asserts that this Court has no jurisdiction to review Appellant's case, but recognizes this Court's contrary published decision in United States v. Vanzant, 84 M.J. 671, 675 (A.F. Ct. Crim. App. 2024) *pet. granted*, 2024 CAAF LEXIS 640 (C.A.A.F. 2024). The United States continues to assert this position regarding lack of jurisdiction pending litigation at our superior Court.

STATEMENT OF FACTS

Appellant's Crime Against AM

AM testified to the following facts. AM attended technical school at Sheppard Air Force Base, Texas, shortly after 11 September 2019. (R. at 300.) Phase I of technical school was called fundamentals where students learned the basics of the maintenance career field, and Phase II was hands on job specific training working directly with the aircraft. (R. at 301, 326.) AM could not recall the exact dates of each phrase of the course. (Id.) Phase I occurred from September to October 2019, and Phase II took place in November and December 2019. (R. at 325.) Appellant was AM's instructor for Phase II. (R. at 302.)

As the instructor, Appellant had "authority over the students" in Phase II, to include AM. (R. at 302.) There were only five females in AM's training class. (R. at 302.) At first, Appellant had strict protocols, such as marching in formation, but after some time Appellant "warmed up a little bit and he wasn't as strict." (R. at 302.) AM described that Appellant joked

around with the students, and got "more comfortable." Appellant's remarks became sexual. (R. at 303.) AM described Appellant's sexual comment: "I can recall was him saying something along the lines of [AM], when you going to let me, I can't recall if he said hit or smash, but either word is kind of just like a term for have [sic] sex." (R. at 303.) AM was in shock after Appellant's comment. (Id.) Appellant and AM were in the hangar working on the jets when Appellant made this comment. (R. at 319.) AM explained that Appellant's sexual comment had nothing to do with the conversation they were having, and Appellant was very serious when he asked AM when she was going to let him hit it or words to that effect. (R. at 319.)

AM had a boyfriend while she was at technical school, and Appellant knew AM's boyfriend. (R. at 303.) AM's boyfriend attended technical school with her, but was in a different class. (R. at 303.) Appellant made comments that AM was "out of [her boyfriend's] league." (R. at 303.) During the Thanksgiving holiday AM rented an Air BnB, and when Appellant found out about it he said, "if you send me the address, I'll give you extra credit, if you, I guess, allow me to come." (R. at 304.)

AM graduated from technical school in December 2019, before the Christmas holiday. (R. at 306.) After graduation, Appellant added AM as a friend on social media platforms, such as SnapChat and Instagram. (R. at 307.) During this time after training, Appellant asked AM to send him photos of her. (Id.) AM was under the impression that Appellant requested nude photos. (Id.) AM did not send Appellant any photos and blocked him on social media. (R. at 309.)

Appellant's Crime Against DO

DO testified that she attended technical school at Sheppard Air Force Base, Texas, from September to December 2019. (R. at 345-46.) Appellant was DO's instructor during Phase II of technical school. (R. at 346.) DO explained that as an instructor Appellant was at first strict, but then got more comfortable with the class. (R. at 346-47.) DO said that Appellant made sexual remarks. (Id.) When DO was practicing loading bombs in the hangar, she asked "if [she] could sit out and he said, yes, if you sit on my face." (R. at 347.) DO did not take this comment as a joke, and was uncomfortable after this sexual advance. (R. at 347.) DO's request to sit out was about sitting out of the exercise of loading bombs and it was not in a joking or sexual manner. (R. at 365-66.) DO also mentioned that Appellant told her that she had "a good butt for a white girl." (R. at 348.)

Appellant had a Duty to Maintain Professional Relationships with Trainees

MSgt EP was the instructor supervisor at the training squadron where Appellant was assigned to at Sheppard Air Force Base, Texas. (R. at 273.) MSgt EP explained that all instructors had to attend training on Equal Opportunity, sexual harassment, and other topics telling training instructors how they should conduct themselves with trainees. (R. at 273-74.) These trainings were geared to show instructors how to maintain professional relationships and not partake in unprofessional relationships or commit sexual harassment and sexual assault. (R. at 275.) Trainers could not have any relationships with the trainees, such as a sexual relationship or even a platonic friendship. (R. at 276.)

Regulation Admitted to Support Appellant's Crimes

As it relates to Appellant's crimes against AM and DO, the prosecution admitted excerpts from the following regulation with no objection from trial defense counsel:

- Air Force Instruction (AFI) 36-2909, *Air Force Professional Relationships and Conduct*, (14 November 2019).

(R. at 268-69.) Per the prosecutions request, the military judge took judicial notice under Mil. R. Evid. 201 as to the existence of the AFI at the time listed on the exhibit. (R. at 269.) AFI 36-2909 prohibited trainers or instructors from attempting to establish a sexual relationship with a trainee and making sexual advances towards a trainee. (Pros. Ex. 1 at 17.)

Findings

The military judge found that Appellant on one occasion wrongfully attempted to develop a sexual relationship with a trainee when he asked AM "When will you let me hit or smash?" or words to that effect in violation of a lawful general regulation, Article 92, UCMJ. (*Entry of Judgment*, 22 May 2022, ROT. Vol, 1.) Next, the military judge also found that Appellant on one occasion wrongfully made a sexual advance towards DO when he said, "Yes, if you sit on my face" in violation of a lawful general regulation, Article 92, UCMJ. (Id.) The military judge made special findings, and articulated exactly what conduct he found Appellant guilty of. (R. at 907.)

ARGUMENT

I.

THE FINDINGS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

Issues of factual and legal sufficiency are reviewed de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (citing Washington, 57 M.J. at 399). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

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 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 citations omitted). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

To sustain a conviction for a violation of a lawful general regulation in violation of Article 92(1), UCMJ, beyond a reasonable doubt, the government must show: 1) that there was in effect a certain lawful general order or regulation; 2) that the accused had a duty to obey it; and 3) that the accused violated of failed to obey the order or regulation. Manual for Courts-Martial, United States (MCM), part. IV, para. 18.b.(1)(a)-(c) (2019 ed.)

Analysis

A. The record demonstrated that AFI 36-2909 was in effect throughout the entire charged timeframe.

Prosecution Exhibit 1, excerpts from AFI 36-2909, was dated 14 November 2019. (Pros. Ex. 1.) This version of AFI 36-2909 superseded its previous version dated 27 April 2018. (Id.) Thus, a version of AFI 36-2909 was in effect throughout the charged timeframe of 1 October 2019 through 31 December 2019.

As Appellant correctly stated, to prove that a regulation existed, a military judge can take judicial notice of the pertinent regulation. (App. Br. at 6 citing United States v. Williams, 3 M.J. 155, 156 (C.M.A. 1977.)) Here, the military judge took judicial notice of AFI 26-2909 effective 14 November 2019 and its predecessor. (R. at 268-69.) Still Appellant argues that the military judge only took judicial notice of the excerpt in Prosecution Exhibit 1. (App. Br. at 7.) This was not the case. Trial counsel asked the military judge to "to take judicial notice under MRE 201 of the existence of those Air Force instructions, at the time listed on the exhibits." (R. at 269.)

What was listed on the exhibit itself, page one, was the previous version of the regulation that covered the charged timeframe before 13 November 2019. Thus, the military judge took judicial notice of the previous version of AFI 36-2909 that covered the first half of the charged timeframe. Appellant states that even though the excerpt revealed that there was a previous version of the regulation, there was no evidence establishing what this regulation said before that 14 November 2019. (App. Br. at 7.) But no evidence had to be presented because the military judge took judicial notice of the regulations in effect at the time of Appellant's trial – including AFI 36-2909 effective 14 November 2019 and its predecessor AFI 36-2909 dated 27 April 2018.

Here, the military judge was presumed to know the law. *See* United States v. Erickson, 65 M.J. 221, (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."). And the record demonstrated that the military judge took judicial notice of the regulations at issue and made specific findings to find Appellant guilty of attempting to establish a sexual relationship with a trainee and making a sexual advance towards a trainee – conduct that was always prohibited throughout the charged timeframe. (Pros. Ex. 1; Appendix.) If the military judge, sitting alone, had any reservations of what regulation was in effect, he could have sua sponte brought the issue before the parties or simply found Appellant not guilty. But this did not happen. In fact, a closer look at AFI 36-2909 dated 14 November 2019 in Prosecution Exhibit 1 and AFI 36-2909 dated 27 April 2018 (Appendix) prohibit the same misconduct – attempting to develop a sexual relationship with a trainee and making sexual advances to a trainee. Appellant's conduct was prohibited throughout the entire charged timeframe.

Nor was there any confusion as to what regulation existed at the time of the charged timeframe. Trial defense counsel did not object or even make an R.C.M. 917 motion for a

finding of not guilty arguing that the government failed to provide evidence showing what lawful regulation was in effect from 1 October 2019 to 13 November 2019.

Even if this Court were to find that the government failed to show what regulation was in effect from 1 October 2019 to 13 November 2019, the evidence demonstrated that Appellant's conduct occurred most likely on or after 14 November 2019. Both AM and DO testified that Appellant made unprofessional advances towards them during Phrase II of technical school. Phase II took place in November and December 2019. (R. at 325.) And the record demonstrated that Appellant was contacting female members of the class around the Thanksgiving holiday (R. at 304.) Given the context in which Appellant engaged with the trainees – becoming more inappropriate during Phase II and around the Thanksgiving holiday[1] – it was logical for the factfinder to conclude that Appellant made these unprofessional comments after 13 November 2019.

For these reasons, Appellant's arguments fail. AFI 36-2909 existed during the charged timeframe, and the military judge took judicial notice of it. The lack of excerpts from AFI 36-2909 dated before 14 November 2019 in the record had no bearing on the legal and factual sufficiency of Appellant's convictions.

[1] Thanksgiving occurred on 28 November 2019.

B. Appellant' conduct violated AFI 36-2909.

Appellant's convictions are factually and legally sufficient. The government proved the following elements of Article 92(1), UCMJ. First, as discussed above, there was in effect a certain lawful general order or regulation, AFI 36-2909. Second, Appellant had a duty to obey it. As an instructor, Appellant underwent training on the subjects of Equal Opportunity, sexual harassment, and other trainings to show how instructors should conduct themselves while training airman that included professional relationships . (R. at 273-74.) Appellant knew that he could not establish any sexual relationship or any relationship for that matter with any trainee. (R. at 276.) Every instructor, including Appellant, had to sign a document that outlined prohibited activities, such as unprofessional relationships. (R. at 275.) Thus, the record provided the factfinder evidence that instructors at technical school had a duty to maintain a professional relationship with trainees.

Finally, Appellant failed to obey the regulation governing Air Force professional relationships and conduct when he asked AM to have sex, which was an attempt to establish a sexual relationship – conduct squarely prohibited by AFI 36-2909. (Pros. Ex. 1 at 17.)[2] Appellant argues that asking AM if he could "hit" or "smash" did not rise to the level of the alleged regulation violations. (App. Br. at 9.) Appellant relies on United States Da Silva, ACM 39599, 2020 CCA LEXIS 213, at *38-42 (A.F. Ct. Crim. App. 25 June 2020) arguing that his conduct was not as severe as the appellant in Da Silva and therefore should not be criminalized. (App. Br. at 9.) Appellant also argues that his comment was ambiguous. (Id.) But Appellant comment was not ambiguous. Appellant directly asked AM in a non-joking manner if he could

[2] AFI 36-2909, dated 27 April 2018, also prohibited instructors from attempting to establish a sexual relationship with a trainee. (Appendix.)

hit or smash – terms that reference sex. (R. at 303.) And AM testified that when Appellant made this comment, he asked for sex. (Id.) Just because Appellant did not make other gestures like the Appellant in Da Silva, such as physically touching the victim, did not downplay his unprofessional misconduct. This Court has recognized that advances towards a trainee, such as inviting a trainee over to one's house, inviting a trainee to the movies, and touching a trainee show a "clear attempt to develop a personal relationship" with a trainee in violation of a lawful general regulation. United States v. Cook, ACM 33615, 2001 CCA LEXIS 19, at *8 (AF. Ct. Crim. App. 29 January 2001) (unpub. op.) (finding that the appellant violated Air Training Command Regulation 30-4, paragraph 4.1.5. in violation of Article 92(1), UCMJ). Thus, it follows that Appellant's comment to AM asking to have sex was sufficient for the factfinder to find that Appellant attempted to develop a sexual relationship with AM.

Context surrounding Appellant's attempt to develop a sexual relationship supports this conviction. *See* United States v. Brown, 65 M.J. 227, 231-32 (C.A.A.F. 2007) ("But words are used in context. Divorcing them from their surroundings and their impact on the intended subject is illogical and unnatural."). Appellant would make comments to females in the class about giving out extra credit during the Thanksgiving holiday if he were invited to attend their Thanksgiving festivities – knowing full well he could not give extra credit. (R. at 304, 318.) After training, Appellant contacted AM and requested photos, establishing that Appellant had an interest in AM. His requests for photos, coupled with his comment that he wanted to hit it, proved that he attempted to have a sexual relationship with AM. Thus, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Turner, 25 M.J. at 325. His comment to AM attempted to establish a sexual relationship in violation of AFI 36-2909.

Appellant also failed to obey a regulation when he made a sexual advance to DO. AFI 36-2909 prohibits an instructor or trainer from making a sexual advance toward a trainee. (Pros. Ex. 1 at 17.)[3] Appellant claims that his comment was less severe simply because it was a tasteless joke. (App. Br. at 10.) His comment was not a joke. When DO asked "if [she] could sit out and [Appellant] said, yes, if you sit on my face," was an inappropriate comment for an instructor to make towards an entry level trainee. DO was nervous after the sexual advance and very uncomfortable, and did not perceive Appellant's comment as a joke. (R. at 347.) Thus, this comment was an unwanted sexual advance towards DO, a trainee, in violation of AFI 36-2909. (R. at 347; Pros. Ex. 1 at 17.) Once again context matters. *See* Brown, 65 M.J. at 231-32. And DO mentioned that Appellant told her something about her "having a good butt for a white girl." (R. at 348.) Placing Appellant's comment – "if you sit on my face" – in context with other sexual comments he made during training and about DO "having a good butt," supports a finding that Appellant had a sexual interest in DO and made a sexual advance towards her when he asked her to sit on his face in violation of AFI 36-2909. Thus, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Turner, 25 M.J. at 325.

After an impartial view of the evidence, this Court should conclude that the evidence presented at trial constituted proof of each required element beyond a reasonable doubt. Because Appellant's conviction is factually sufficient, it meets the lower standard for legal sufficiency. A rational factfinder could have found all the elements of a violation of a lawful general regulation beyond a reasonable doubt, as the military judge did in this case. Thus, Appellant is not entitled to relief. This Court should deny this assignment of error.

[3] AFI 36-2909, dated 27 April 2018, also prohibited instructors from making sexual advances to trainees. (Appendix.)

II.

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

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Statement of Trial Results,* 26 May 2022, ROT, Vol. 1); (*Entry of Judgment*, 30 June 2022, ROT, Vol. 1.)

Standard of Review

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

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Appellant asserts that his convictions did not trigger the firearm prohibition under 18 U.S.C. § 922. (App. Br. at 11). He also argues that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, citing the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). (Id.) Appellant's constitutional argument lacks merit and is a collateral matter beyond this Court's authority to review.

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

This Court recently held in its published opinion in Vanzant that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. 84 M.J. at 675. Thus, this Court lacks jurisdiction to grant Appellant relief.

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

In any event, the 18 U.S.C. § 922(g)'s firearm prohibitions was constitutional as applied to Appellant. Appellant was found guilty of a crime punishable by imprisonment for a term exceeding one year, that is, by two years of confinement. Manual for Courts-Martial, part. IV, para. 18.d(1) (2019 ed.)(MCM). The Staff Judge Advocate correctly annotated the firearms prohibition. Department of the Air Force Instruction 51-201**,** *Administration of Military Justice*, para. 29.30.1 (14 April 2022).

C. The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant.

Although Appellant makes the argument that 18 U.S.C. § 922(g) is unconstitutional as applied to him given that he was convicted of a non-violent offense, this argument is unpersuasive. (App. Br. at 12-14.) The Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* Bruen, 597 U.S. at; McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). "[T]he right was *never* thought to sweep indiscriminately." United States v. Rahimi, 602 U.S. 680, 691 (2024). The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons,

including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added). Firearms prohibitions for felons are "presumptively lawful." Rahimi, 602 U.S. at 699 (citing Heller, 554 U.S. at 626). 18 U.S.C. § 922(g) does not delineate between violent and non-violent offense. Because Appellant has been convicted by a general court-martial of a serious crime, application of 18 U.S.C. § 922(g) to him is constitutional.

D. This Court may not order correction of the First Indorsement to the Entry of Judgment under Article 66(d)(2), UCMJ.

Appellant suggests that Vanzant is not dispositive of his request because he has framed the issue merely as an error in post-trial processing under Article 66(d)(2), UCMJ, which he claims this Court did not analyze in Vanzant. (App. Br. at 17.) First, the Vanzant opinion was clear as to the scope of its jurisdiction under Article 66, UCMJ. Next, Appellant is not entitled to relief under Article 66(d)(2), UCMJ. A CCA "***may*** provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial ***after*** the judgment was entered into the record under section 860c of this title[.]" (emphasis added). The 18 U.S.C. § 922 annotation was entered into the record before the EOJ was entered into the record. The 18 U.S.C. § 922 annotation on the First Indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are entered into the record. 10 U.S.C. § 8Article 60(1)(C). Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in Article 66(d)(2). *Compare* Article 66 *with* Article 60c. Because the STR and the First Indorsement are entered into the record before the EOJ is entered into the record under Article 60c, the 18 U.S.C. § 922

annotation on the STR's First Indorsement is not an error occurring "*after* the judgment was entered into the record." Article 66(d)(2) (emphasis added).

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

Appellant suggests that this Court could correct the First Indorsement to the EOJ because it was attached to the EOJ, which was completed after the EOJ during post-trial processing. (App. Br. at 16.) But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Even if this Court had authority to remove the firearms prohibition annotation from the First Indorsement to EOJ (*Entry of Judgment*, ROT Vol. 1 at 3), it could not remove the firearms annotation from the STR that was incorporated into the EOJ (*Entry of Judgment*, ROT, Vol. 1, Attach. at 3) because that annotation on the STR occurred before the EOJ was entered into the record. Thus, Appellant would remain in the same situation he is in now – having a firearms prohibition annotated on the EOJ. Since this Court's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should deny Appellant's claim.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 January 2025.

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APPENDIX

Chapter 4

PROHIBITION AGAINST INAPPROPRIATE RELATIONS DURING RECRUITING AND ENTRY LEVEL TRAINING

4.1. Recruiting, entry-level processing, and entry-level training. The first impression that most prospective Air Force members form of the Air Force is through contact with an Air Force military or civilian recruiter. This experience is a critical first step in the development of prospective Air Force members because the recruiter establishes expectations about all aspects of life in the Air Force. In addition, the relationship provides the prospective Air Force members the first example of Air Force core values and standards of conduct. Once a prospective Air Force member gains acceptance and enters the Air Force, the next critical developmental steps are entry-level processing and entry-level training. The positive attitude, approach to professionalism, demonstration of proper professional relationships, and reflection of the Air Force core values by recruiters and trainers in these steps are critical to shaping new Air Force members. These critical developmental steps must not be compromised by unprofessional relationships between recruiters and prospective Air Force members or recruits; nor between trainers and trainees, students, or cadets.

4.1.1. Air Force members should treat prospective Air Force members, applicants, recruits, cadets, students, and trainees with dignity and respect as they pursue their aspirations of serving in the military. Air Force policy prohibits inappropriate relationships between recruiters and prospects, applicants, and/or recruits and between trainers providing entry-level training and trainees, students and cadets.

4.1.2. Unprofessional relationships and prohibited activities, as defined in this instruction, between recruiters and prospective Air Force members, applicants, and/or recruits and between trainers providing entry-level training and trainees, students, and/or cadets, are not permitted and appropriate action should be taken.

4.2. Prohibited activities between recruiter-recruits and trainer-trainees. Prohibited activities of a military or civilian recruiter when dealing with a prospective Air Force member, an applicant, or a recruit are outlined in paragraph 4.2.1. Prohibited activities of a military or civilian trainer providing entry-level training to a trainee, student or cadet are also outlined in paragraph 4.2.1. Prohibited activities for which a recruit or trainee, student, or cadet may be held accountable are outlined in paragraph 4.2.2. These prohibitions begin on the date of first contact between a prospective member of the Air Force and a recruiter, through accession and initial skills training, and for six months after the trainee, student or cadet completes initial skills training or ending on the date on which the member physically arrives at that member's first duty assignment following completion of initial entry training, whichever is later. The specific prohibitions in this chapter apply only to the Air Force recruiting and entry-level training environments. **(T-0).**

4.2.1. Recruiters, and trainers who provide entry-level training, will not engage or attempt to engage in any of the following prohibited activities. ***Failure by Regular Air Force members, Air Force Reserve members on active duty or inactive duty for training, and Air National Guard members in Title 10 status to obey the mandatory provisions in this paragraph and subparagraphs constitutes a violation of Article 92, Uniform Code of Military Justice. Air National Guard members in Title 32 status performing full-time***

National Guard duty or inactive duty for training, who violate the mandatory provisions of this instruction, may be held accountable through similar provisions of their respective State Military Codes.

4.2.1.1. Develop or conduct a personal, intimate, or sexual relationship with a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet. This includes, but is not limited to, dating, handholding, kissing, embracing, caressing, and engaging in sexual activities. Prohibited personal, intimate, or sexual relationships include those relationships conducted in person or via cards, letters, e-mails, telephone calls, instant messaging, video, photographs, social networking, texting, or any other means of communication.

4.2.1.2. Use grade or position, threats, pressure, or promise of return of favors or favorable treatment in an attempt to gain sexual favors from a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet.

4.2.1.3. Make sexual advances toward, or seek or accept sexual advances or favors from, a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet.

4.2.1.4. Allow entry of a prospective Air Force member, applicant, recruit, trainee, student, or cadet into their dwelling. Exceptions are permitted when the safety or welfare of the prospective member, applicant, recruit, trainee or student is at risk; or, to conduct official business, with command approval, in accordance with paragraph 4.5.

4.2.1.5. Establish a common household with a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet, that is, sharing the same living area in an apartment, house, or other dwelling. This prohibition does not include facilities open to all members of a homeowners association or all tenants in an apartment complex.

4.2.1.6. Allow entry of a prospective Air Force member, applicant, recruit, trainee, student, or cadet into a recruiter's or trainer's privately-owned vehicle(s). Exceptions are permitted for official business or when the safety or welfare of recruit(s) or trainee(s) is at risk. When practicable, recruiters and trainers should travel in pairs when transporting a recruit or trainee in a privately-owned vehicle.

4.2.1.7. Provide alcohol to, or consume alcohol with, a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet, on a personal social basis.

4.2.1.8. Attend social gatherings, clubs, bars, theaters, or similar establishments; or, participate in sporting activities (e.g., golf, racquetball, bowling) on a personal social basis with a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet.

4.2.1.9. Gamble with a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet.

4.2.1.10. Lend money to, borrow money from, or otherwise become indebted to a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet.

4.2.1.11. Solicit donations from a prospective Air Force member, an applicant, a recruit, a trainee, a student, or a cadet.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Technical Sergeant (E-6) **MATTHEW S. HENDERSON,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 3 No. ACM 40419 31 January 2025

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

Appellant, Technical Sergeant (TSgt) Matthew S. Henderson, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the United States' Answer, dated 24 January 2025 (Ans.). In addition to the arguments in his opening brief, filed on 19 December 2024, TSgt Henderson submits the following additional arguments.

I.

The findings of guilty are legally and factually insufficient because the evidence does not prove what the regulation at issue said throughout the charged timeframe and the conduct identified in the special findings was not severe enough to violate the regulation in the ways the specifications detailed.

A. The Government failed to prove that Air Force Instruction 36-2909 prohibited the charged conduct at the times of the alleged offenses.

The Government failed to prove that the charged conduct was prohibited by Air Force Instruction (AFI) 36-2909, *Air Force Professional Relationships and Conduct*, throughout the charged timeframe because it failed to introduce evidence of what that regulation said for the first half of the charged timeframe. To prove a violation of a lawful general regulation, the Government must introduce evidence of the specific regulation that was allegedly violated. *United States v. Williams*, 3 M.J. 155, 156 (C.M.A. 1977). This is necessary to prove both that the regulation

existed at the time of the alleged violation and "that both the accused and his act(s) were within the proscription of the same regulation." *Id.* The Government failed to prove TSgt Henderson's charged conduct was proscribed by AFI 36-2909 at the time of commission because it only admitted evidence of what AFI 36-2909 proscribed on and after 14 November 2019, which was halfway through the charged timeframe of between on or about 1 October 2019 and 31 December 2019. Pros. Ex. 1; DD Form 458, *Charge Sheet*, 1 September 2021.

The Government first tries to excuse this failure by arguing that it proved AFI 36-2909 existed throughout the charged timeframe. Ans. at 7–8. But proving the regulation existed is only part of what the Government must do to meets its burden. It also must prove that the charged conduct was "within the proscription of the same regulation." *Williams*, 3 M.J. at 156. No reasonable factfinder could find that a regulation proscribed certain conduct without seeing evidence of what that regulation said at the time.

With a dearth of evidence in the record indicating what the pre-14 November 2019 version of AFI 36-2909 said, the Government latches on to the mere reference to the prior version in Pros. Ex. 1, arguing that this reference somehow incorporates the contents of that version. Ans. at 7–8. That is not sufficient to meet the Government's burden. A notation of an old version, which was "substantially revised," does not indicate what that version said and therefore provides no evidence of what conduct that version proscribed. Pros. Ex. 1. Further, the Government's logic that a prior version is incorporated by reference would then incorporate older versions noted in the incorporated one and its predecessors, creating an endless chain of incorporation. Such problematic logic does not fulfill the Government's burden of proof.

The legal and factual insufficiency remains even though the military judge took judicial notice of an excerpt from AFI 36-2909. "Judicial notice is a procedure for the adjudication of

certain facts or matters without the requirement of formal proof. It cannot, however, be utilized as a procedure to dispense with establishing the government's case." *United States v. Paul*, 73 M.J. 274, 279 (C.A.A.F. 2014) (quoting *Williams*, 3 M.J. at 157). When he took judicial notice of the AFI 36-2909 excerpt offered by the Government, the military judge did not take judicial notice of the contents of a previous version of the regulation, as the Government argues he did. Ans. at 8. Rather, he merely admitted the offered excerpt without requiring the Government to formally prove normal requirements like foundation and authentication. R. at 269. This is particularly clear because both the trial counsel and the military judge limited discussion on the record to just this excerpt. R. at 268–69. Trial counsel asked the military judge to take judicial notice of the "existence of" the AFI "at the time listed on the exhibits," and the military judge stated, "I will take judicial notice *of those excerpts of the AFIs*."[1] R. at 269 (emphasis added). This judicial notice did not extend beyond the excerpt offered or establish the contents of the regulation before the date listed on it. Consequently, judicial notice does not save the Government's case from legal and factual insufficiency.

The Government's answer itself implicitly recognizes the necessity of evidence showing what a regulation said. If the Government's arguments were correct and evidence in the record sufficiently showed what conduct AFI 36-2909 proscribed before 14 November 2019, it would be unnecessary to attach a copy of the regulation in effect before that date. But the Government did attach an excerpt from AFI 36-2909, dated 27 April 2018, to its answer. Ans. at Appendix. It then pointed to the Appendix when asserting that this version of the regulation prohibited the same conduct as the version in evidence. Ans. at 8. Including this excerpt with its answer inherently

[1] The excerpt from AFI 36-2909 was introduced alongside an excerpt from another regulation that was relevant to a specification of which TSgt Henderson was ultimately acquitted. R. at 268–69.

acknowledges the necessity of evidence showing what conduct the regulation proscribed and its absence from the actual trial. But, as the Government acknowledges, arguments concerning legal and factual sufficiency are constrained "to the evidence presented at trial," Ans. at 6 (quoting *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), rather than what the Government might now seek to introduce on appeal. Because the Government failed to prove the contents of this previous version of the AFI at TSgt Henderson's court-martial, his convictions are legally and factually insufficient.

Faced with this shortfall of evidence, the Government goes on to attempt to lower the burden of proof for the charged offenses. It argues that even if its evidence failed to establish what conduct the regulation prohibited before 14 November 2019, "the evidence demonstrated that Appellant's conduct occurred *most likely* on or after 14 November 2019." Ans. at 9 (emphasis added). The Constitution requires the Government to prove every element of the charged offense beyond a reasonable doubt. *E.g.*, *In re Winship*, 397 U.S. 358, 363–64 (1970); *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995). "Most likely" is a lower standard than beyond a reasonable doubt, so the Government would not have met its burden even if its assertion was true.

Moreover, this "most likely" assertion is not supported by the evidence or the findings. The evidence did not support a more specific finding about the date of the offense because both A.M. and D.O. testified only that the alleged conduct happened sometime during Phase II of training, which lasted two to three months and ended with graduation in December 2019. R. at 301–02, 306, 313, 319, 346–47, 364, 368. Even if the Government's contention that Phase II was limited to November and December 2019 was correct, the comments are just as "most likely" to have been made in the first half of November, leaving reasonable doubt that they violated the regulation in effect starting on 14 November 2019. Ans. at 9. Further, the military judge found

TSgt Henderson guilty of committing the charged offenses within the charged timeframe of between on or about 1 October 2019 and 31 December 2019, and none of his special findings altered the timeframe. R. at 907. Those findings are legally and factually insufficient, and this Court must reject the Government's attempt to lower its own burden to something less than beyond a reasonable doubt.

B. The specific instances on which the convictions are based are insufficient to prove an attempt to establish a sexual relationship and a sexual advance.

The military judge's special findings identified two instances for which he found TSgt Henderson guilty of attempting to establish a sexual relationship with a trainee and making a sexual advance toward a trainee: asking A.M. "when will you let me hit or smash?" and telling D.O. "yes, if you sit on my face." R. at 907. While they are inappropriate, neither of these comments rises to the level of the charged misconduct. The Government dismisses TSgt Henderson's comparisons to a past case involving sexual advances towards trainees, arguing that the lack of comparable conduct does not downplay his actions. Ans. at 10–11 (citing *United States v. Da Silva*, No. ACM 39599, 2020 CCA LEXIS 213, at *38–42 (A.F. Ct. Crim. App. Jun. 25, 2020)). But the Government then immediately points to another case in which far more conduct supported the conviction. Ans. at 11 (citing *United States v. Cook*, No. ACM 33615, 2001 CCA LEXIS 19, at *8 (A.F. Ct. Crim. App. Jan. 29, 2001)). As the Government describes, *Cook* shows "that advances towards a trainee, such as inviting a trainee over to one's house, inviting a trainee to the movies, and touching a trainee show a 'clear attempt to develop a personal relationship' with a trainee in violation of a lawful general regulation." *Id.* (quoting *Cook*, 2001 CCA LEXIS 19, at *8). This is another example of a case in which a similar conviction was based on far more extensive conduct. TSgt Henderson was not found guilty based on any equivalent conduct, and there was not a "clear

attempt to develop" a sexual relationship. *Cook*, 2001 CCA LEXIS 19, at *8. The findings were instead each based only on an individual, obscure comment.

The Government also encourages the use of context to suppo1t the guilty findings, but the context it highlights does not overcome the legal and factual insufficiency. Ans. at 11-12. The Government cheny-picks several other comments, seemingly from other occasions, that show, at most, TSgt Henderson saying some imprndent things. *Id.* None of these comments are sexual advances themselves, and they do not make other comments sexual advances or attempts to establish a sexual relationship. Adding context does not show TSgt Henderson's comments constitute the offenses of which he was convicted. What context does reveal is that the statements on which the convictions are based both came during class time in a hangar with other people around. R. at 319, 364-65. That context indicates the comments, though crnde and improper, were ill-advised jokes, not a sexual advance or an attempt to establish a sexual relationship. This Comt should hold the findings of guilty to be legally and factually insufficient.

WHEREFORE, TSgt Henderson respectfully requests that this Honorable Comt set aside the findings of guilty and the sentence and dismiss the remaining Charge and its Specifications with prejudice.

Respectfolly submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Comi and served on the Government Trial and Appellate Operations Division on 31 Januaiy 2025.

Respectfully submitted,

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40419**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Matthew S. HENDERSON	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 2d day of April, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal