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. 2
Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)	No. ACM 40537 3 January 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **13 March 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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(240) 612-4770
Megan.crouch.1@us.af.mil

4 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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 4 January 2024.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. JAELEN JOHNSON ACM: 40537

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

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

February 13, 2024
Date

[redacted]
Signature

Donald C. King [redacted]
Print Name Bar Number

501 West Broadway, Suite 800
Address

San Diego CA 92101
City State Zip Code

619-289-8286 info@kingmilitarylaw.com
Phone Number E-Mail

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40537 1 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 April 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings

and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 1 March 2024.

[redacted]

MEGAN R. CROUCH, 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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Megan.crouch.1@us.af.mil

4 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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 4 March 2024.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)	No. ACM 40537 1 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 May 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings

and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson.

Through no fault of Appellant, his counsel have yet to complete their review of Appellant's case. This 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 a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 1 April 2024.

[redacted]

MEGAN R. CROUCH, 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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Megan.crouch.1@us.af.mil

2 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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 2 April 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40537**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jaelen M. JOHNSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 3 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fourth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

Appellant's motion failed to comply with Rule 23.3(m)(6) of this court's Rules of Practice and Procedure. A motion for an enlargement of time that, if granted, would expire more than 180 days after docketing must include, *inter alia*, "a detailed explanation of the number and complexity of counsel's pending cases; a statement of other matters that have priority over the subject case; and a statement as to progress being made on the subject case." A.F. Ct. Crim. App. R. 23.3(m)(6). Appellant's case was docketed with this court on 14 November 2023. If Appellant's motion is granted, 210 days will have elapsed since docketing.

The court has considered Appellant's motion, this court's Rules of Practice and Procedure, the Government's opposition, case law, and judicial economy. Accordingly, it is by the court on this 8th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fourth) is **GRANTED**. Appellant shall file any assignments of error not later than **11 June 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

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. Counsel is not required to re-address item (1) in each subsequent motion for 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]E, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40537 3 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 an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **11 June 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings

and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson.

Through no fault of Appellant, his counsel have yet to complete their review of Appellant's case. Undersigned counsel was only recently detailed to represent Appellant. This enlargement of time is therefore necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

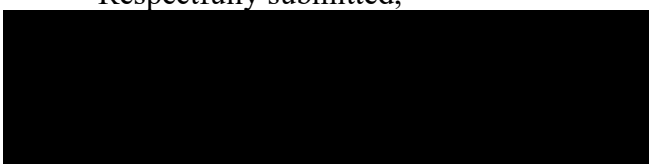
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

7 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 May 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JAELEN M. JOHNSON** United States Air Force, *Appellant.*	)	No. ACM 40537 7 May 2024

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Capt Michael Bruzik has been detailed substitute counsel in undersigned counsel's stead and made his notice of appearance on 3 May 2024. A thorough turnover of the record between counsel has been completed. Maj Crouch is expected to be out of the office on convalescent and parental leave for approximately five months beginning June 2024 and her continued representation of Appellant would only delay his appellate review. Mr. Don King continues to represent Appellant as lead civilian appellate defense counsel.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 May 2024.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Megan.crouch.1@us.af.mil

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. 2
Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)	No. ACM 40537 4 June 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **11 July 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings

and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned counsel has been in communication with Appellant concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton* – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case it on its seventh enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 1134 page transcript. This case is on its fifth enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.
3) *United States v. Johnson*, ACM 40537 – This is the instant case.

4) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case is on its fourth enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has yet to complete his review of Appellant's case. Civilian counsel has completed an initial review of the ROT. Undersigned counsel was not detailed to this case until 29 April 2024, shortly before the withdrawal of Appellant's previously detailed military appellate defense counsel. Since being detailed, counsel was hard at work on other matters. This included submission of an answer to a petition for extraordinary relief in *In re AG*, Misc. Dkt. 2024-05 on 28 May 2024. Additionally, counsel submitted an assignment of errors to this Court for *United States v. Cassaberry-Folks*, ACM 40444 on 31 May 2024. Counsel completed these despite taking leave between 22 – 29 May 2024. Both cases had more immediate deadlines than the instant case, particularly *United States v. Cassaberry-Folks* which was on its eleventh enlargement of time. Appellant is entitled to representation under Article 70, UCMJ. *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). Given undersigned counsel's recent detailing to this case, along with his other priorities, an enlargement of time is necessary for counsel to full review Appellant's record of trial, coordinate with civilian counsel, and advise on potential errors.

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

Respectfully submitted,

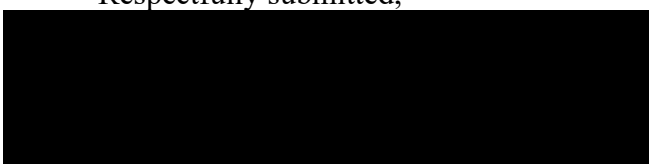
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 June 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

6 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 June 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)	No. ACM 40537 21 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 an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **11 July 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 189 days have elapsed. On the date requested, 240 days will have elapsed.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings

and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Undersigned counsel is currently assigned 20 cases; 14 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *In re A.G.*, Misc. Dkt. 2024-05 – This is a petition for extraordinary relief filed by an individual claiming Article 6b, UCMJ, status. A response from the real party in interest is due to this Court on 28 May 2024.
2) *United States v. Cassaberry-Folks*, ACM 40444 – The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel is working towards completion of a final drafted assignment of errors. This case is on its eleventh and final enlargement of time and due for submission on 31 May 2024.
3) *United States v. Hilton* – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case it on its seventh enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.
4) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution

exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 1134 page transcript. This case is on its fifth enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.

Through no fault of Appellant, his counsel have yet to complete their review of Appellant's case. Undersigned counsel was only recently detailed to represent Appellant. Undersigned counsel is hard at work completing briefs for both *In re AG* and *United States v. Cassaberry-Folks*, which are both due this Court within days of each other. Additionally, undersigned counsel is taking leave from 22 – 29 May 2024. This enlargement of time is therefore necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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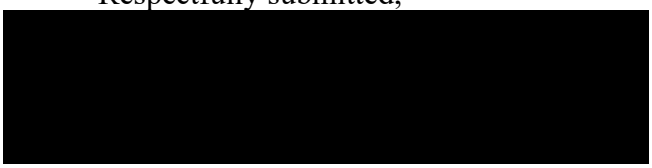
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 May 2024.

Respectfully submitted,



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22 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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
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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 22 May 2024.

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

UNITED STATES *Appellee,* v. Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME (SIXTH)** Before Panel No. 2 No. ACM 40537 15 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 an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 14 days, which will end on **25 July 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 244 days have elapsed. On the date requested, 254 days will have elapsed.[1] Good cause exists to file this motion out of time because the request is driven by unanticipated circumstances which were not apparent up until now. In particular, although counsel has nearly completed an assignment of errors, Appellant requests additional time to review it in order to ensure that his interests on appeal are being adequately submitted to this Court. Additionally, counsel attempted to file this motion on 11 July 2024, however the incorrect workflow email address populated in the "to" box, thus preventing its receipt by this Court.

[1] Appellant's motion for a sixth EOT was originally filed on 12 July 2024. However, that filing contained a scrivener's error which incorrectly documented the duration of time between the date of docketing and the requested date for enlargement. Counsel respectfully withdraws that motion and submits this one instead.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, counsel has been in communication with Appellant concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Capt Bruzik is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton* – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits,

and 102 appellate exhibits. This case it on its seventh enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.

2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 1134 page transcript. This case is on its fifth enlargement of time. Undersigned counsel has completed an initial review of the record of trial.

3) *United States v. Johnson*, ACM 40537 – This is the instant case.

4) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case is on its fourth enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.

The assignment of errors addresses five issues, which counsel were prepared to submit to this Court today. However, Appellant requests additional time to review the brief and discuss the issues with counsel. Appellant is entitled to representation under Article 70, UCMJ. *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). Accordingly, an enlargement of time is necessary in order for Appellant to review the assignment of errors and to further discuss the brief with his counsel.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
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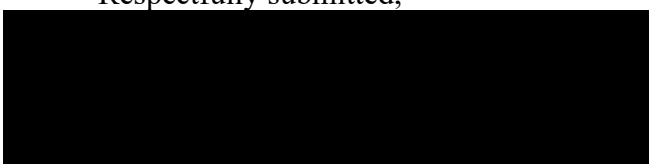
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 15 July 2024.

Respectfully submitted,



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16 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40537 Panel No. 2

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.

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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 16 July 2024.

BRITTANY M. SPEIRS, Maj, USAFR
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JAELEN M. JOHNSON,
Senior Airman (E-4),
United States Air Force,
Appellant.

No. ACM 40537

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)	No. ACM 40537 25 July 2024

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS EVIDENCE UNLAWFULLY OBTAINED FROM APPELLANT'S CELL PHONES.

II.

WHETHER A DELAY OF 195 DAYS BETWEEN THE IMPOSITION OF PRETRIAL RESTRAINT AND ARRAIGNMENT VIOLATED APPELLANT'S ARTICLE 10 AND R.C.M. 707 SPEEDY TRIAL RIGHTS.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE GOVERNMENT TO ADMIT PICTURES AND VIDEOS UNDER Mil. R. Evid. 404(b).

IV.

IS THE GUILTY FINDING TO SPECIFICATION 2 OF CHARGE II FACTUALLY SUFFICIENT.

V.

WHETHER SENIOR AIRMAN JOHNSON WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

Statement of the Case

A military judge sitting as a general court-martial tried Senior Airman Johnson on 1-2 May 2023. Appellant was found guilty of one specification of assault consummated by a battery, one specification of unlawful entry, and one specification of indecent recording, in violation of Articles 128, 129, and 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 929, and 920c (2019). Appellant was sentenced to a reprimand, 18 months confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad conduct discharge from the United States Air Force. The Convening Authority took no action on the findings or sentence, and the judgment was entered on 25 May 2023.

Statement of Facts

DF was a career police officer who served as a civilian OSI Special Agent at Aviano Air Base. (R. at 347). He had arrived at the Base on 2 August 2022. (R. at 347). He was scheduled to receive housing on 13 August 2022 and stayed in the Family Temporary Lodging Facility (TLF) until then. (R. at 347, 351). His family was still awaiting their visas to be able to join him in Aviano. (R. at 352). DF was assigned to room 213 at the TLF. (R. at 347).

In the early morning hours of 12 August 2022, DF claimed to feel "pressure" on his anus while he was sleeping with his underwear on. (R. at 354). He decided it was likely a bug and went back to sleep. (R. at 355). He was in a deep sleep, had taken melatonin, and was groggy. (R. at 355). Sometime later, DF awoke again to what he initially thought was the feeling of his sheet slipping off his foot as it dangled over the edge of the bed. (R. at 358). He then determined that what he was feeling was a "rhythm" and concluded that someone was in his room. (R. at 358). He kicked out with his right leg, connecting with an individual. (R. at 359). He jumped up onto the bed and turned on the light. (R. at 359). SrA Johnson lay on the ground near the base of DF's bed. (R. at 361).

DF got off of the bed, straddled SrA Johnson, and punched him five to six times in the face. (R. at 363). SrA Johnson made no attempt to hit him back and offered no physical resistance. (R. at 364). SrA Johnson told DF he was not resisting, and DF finally stopped punching him. (R. at 364). DF had SrA Johnson stand up and walked him into the hallway outside his room. (R. at 368). DF yelled for someone to call the police but saw no other guests. (R. at 368). SrA Johnson pulled free of DF and went back towards the room with back towards DF. (R. at 369). DF chased him back into his room and put him in a "rear naked chokehold." (R. at 369). SrA Johnson tried to escape the hold. (R. at 370). SrA Johnson said that he couldn't breathe and eventually convulsed. (R. at 372). At that point, DF released the chokehold. (R. at 372).

DF took SrA Johnson back into the hallway, where a guest from a neighboring room told him she had called Security Forces. (R. at 372). DF sat on SrA Johnson's back with his arm around his neck until Security Forces arrived. (R. at 372).

Security Forces separated the two men and eventually handcuffed, searched, and apprehended SrA Johnson. (R. at 416, 418, 432, 433). Additional facts relevant to each assignment of error are listed below.

Argument

I.

THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED FROM APPELLANT'S CELL PHONES.

Additional Facts

On 12 August 2022, Security Forces received a call about a loud noise complaint at the Family TLF. (R. at 412). When the officers arrived, they found DF sitting on SrA Johnson's back in the hallway outside DF's room. (R. at 415). Upon questioning, the officers learned that DF had awoken to find SrA Johnson in his room. (R. at 420). DF told the officers that he felt a

light graze on his buttocks and a touch on his toes. (R. at 420). He awoke and captured SrA Johnson. (R. at 420).

Security Forces personnel searched SrA Johnson while at the TLF. (R. at 422). They found an iPhone 7 in his pants pocket. (R. at 433). When OSI agents searched DF's room, they found an iPhone 13 Max, which DF said was not his. (R. at 441; AE II at 37, 41).

The OSI agent who initially searched the room and found the iPhone 13 Max was SA AP. (R. at 440). SA AP contacted Col JF, the 31st Medical Group Commander, on the same day. (R. at 147 149). SrA Johnson's unit fell under the 31st Medical Group. (AE XX at 3). SA AP asked Col JF for authorization to search the clothing SrA Johnson was wearing and the cell phone found in SrA Johnson's possession. (R. at 149; AE XVII at 43). This cell phone would have been the iPhone 7 found during the search of SrA Johnson. (R. at 433; AE II at 26, 37). SA AP wanted the authority to look for location data on the cell phone. (R. at 150). SA AP believed that if the phone showed geolocation data placing SrA Johnson near DF's room, it would corroborate DF's account. (R. at 179). He did not believe further inquiry into the phone's contents was warranted. (R. at 186).

SA AP met with Col JF in person concerning the search authorization. (R. at 179). A Judge Advocate from the unit legal office was on the phone advising the commander. (R. at 179). Col. JF gave verbal authorization to search SrA Johnson's clothing for trace evidence and his iPhone 7 for location data. (R. at 181). Several days later, SA AP provided a written affidavit that described the relevant facts to support the verbal search authorization that Col JF had given and to support another search authorization for the TLF room and its contents, including the iPhone 13 Max found there. (R. at 191, 193). Col JF signed a written authorization, memorializing his decision from 12 August 2022. (R. at 181; AE XVII at 43).

This was the first search authorization Col JF had ever been asked to grant. (R. at 155). SA AP testified that Cellebrite, a forensic software used by OSI to analyze cell phones, could

isolate data by location data. (R. at 195-97). Only photos, messages, or other items containing location data will be available when the location tab is opened. (R. at 195). If no location data exists, nothing will be displayed. (R. at 196).

Because DF was an active OSI agent in the Aviano Air Base office, OSI had agents from their Internal Affairs unit take over the investigation. (R. at 201). SA JA came from Quantico, Virginia, to lead the investigation. (R. at 201). On 31 August 2022, he requested an expanded search authorization. (R. at 201). He was seeking a deeper search of both of the iPhones recovered during the investigation. (R. at 201). At the time, the phones had been sent for digital analysis, and the iPhone 13 had been extracted, but the contents had not yet been examined. (R. at 223). Both iPhones were held at the OSI office in Vogelweh Cantonment, Germany. (R. at 215; AE XVII at 48).

SA JA testified that he requested the expanded search authorization because when he spoke to the NCOs who had escorted SrA Johnson into custody, he learned they first took him to his vehicle to retrieve his wallet and other belongings. (R. at 204). They discovered that his car had been unlocked, with the keys inside. (R. at 204). His wallet had been in a pair of pants in the car, and he had a duffel bag containing another change of clothes. (R. at 204). SA JA believed that because SrA Johnson had left so many items behind, the fact that he took the two phones with him meant they might have been somehow involved in the crime itself. (R. at 204).

SA JA had also learned that SrA Johnson had previously been assigned to Incirlik, Turkey. (R. at 205). He contacted OSI in Incirlik and was told that an individual there had reported an unidentified man dressed in black crawling around their bedroom on 29 December 2021. (R. at 205). That same evening, a second witness observed a man matching that description in a bathroom. (R. at 206). This made SA JA suspect that SrA Johnson was the unidentified suspect at Incirlik or other similar incidents. (R. at 206). Importantly, the witnesses

in Incirlik did not identify SrA Johnson or report any involvement of a cell phone in the incidents described. (R. at 212).

SA JA spoke to Col JF by phone and requested a search authorization for any means of communication, such as phone calls, texts, or direct messages, as well as the production of media on both of SrA Johnson's phones. SA JA requested that the date range for this information cover the period of 29 December 2021 to 12 August 2022. (R. at 209). Col JF granted this authorization. (R. at 152; 209).

Col JF testified that he recalled hearing about other incidents similar to what occurred on 12 August 2022 at one of SrA Johnson's prior duty stations. (R. at 152). He did not know which location that was or whether SrA Johnson had been identified as the individual involved in those incidents. (R. at 158). The information about an incident at Incirlik was not contained in the SA JA affidavit provided to Col JF. (R. at 159). Col JF testified that although the incident at a previous duty station had been discussed, his decision to grant the expanded search authorization relied entirely upon the fact that SrA Johnson had two phones with him at the time of the 12 August 2022 incident. (R. at 160). The mere presence of multiple phones made him believe the phones were used for more than just a telecommunication device and might have been used in the offense. (R. at 164). Col JF testified that he believed this even though there had been no indication that a phone had been used, such as a flash or other noise. (R. at 170). Nor was SrA Johnson observed even holding the phones. (R. at 150).

OSI could extract the data from the iPhone 13 easily and began analyzing its contents on 7 September 2022. (R. at 224-25). SA JB was the digital forensics consultant who conducted the examination. (R. at 225). He did not recover any location data or relevant communications. (R. at 227). The forensic software he used allowed him to constrain his search to the date range indicated in the search authorization. (R. at 230). He initially found a significant number of pictures of feet taken at the approximate time of the incident on 12 August 2022. (R. at 227).

Among other videos and photos of feet, SA JB also found videos that appeared to have been taken in a male locker room on 10 August 2022. (R. at 229). OSI investigated and eventually identified ZP as the individual depicted in those videos. (R. at 486). This discovery led to the additional charge. (Charge Sheet).

At trial, the defense moved to suppress all evidence obtained from the cell phones. (App. Ex. XVII). The defense argued that there was no indication that a phone had been used in the commission of the 12 August 2022 offense and that probable cause did not exist to get any information from those cell phones. (R. at 256). In particular, the defense focused on the lack of a nexus between having cell phones with him and using them in the alleged offense. (R. at 262). The defense also argued that the information concerning the Incirlik incident was too vague and not sufficiently tied to either SrA Johnson or any cell phone use to provide probable cause to search SrA Johnson's phones. (R. at 271).

The Government argued that Col JF properly determined probable cause existed and that even if he did not, the inevitable discovery exception applied to the geolocation data requested in the first authorization, and the good faith exception applied to all searches conducted. (R. at 244). Additionally, the Government argued that the exclusionary rule should not apply because any negligible deterrence would not outweigh the harm to the Government caused by suppression of the evidence. (R. at 244).

The Military Judge issued a written ruling in which he found that probable cause existed for both search authorizations. (App. Ex. XX at 23, 26). The ruling contained several factual errors as it pertained to the contents of the search authorizations. First, it confused the two phones, incorrectly stating that the iPhone 7 was found in the TLF room and the iPhone 13 was found on SrA Johnson. (AE XX at 21). Second, the ruling noted the verbal authorization by Col JF to SA AP for a search for location data on "the phone" without distinguishing which phone the discussion was about. (AE XX at 3). The Military Judge pointed out that SA AP's

written affidavit that followed the verbal authorization sought the authority to search both iPhones for location data but did not point out that the actual authorization signed by Col JF still only gave authority to search one iPhone for that data. (AE XX at 3-4). As the iPhone 7 was the one found on SrA Johnson's person and SA AP was only asking Col JF for the authority to search the items found in his possession, that first authorization only allowed for the search of the iPhone 7 for location data. (AE XVII at 43). Third, the Military Judge claimed that the defense had "conceded" that Col JF had the authority to issue the search authorizations when the defense motion only stated that the search "may have been" authorized by a competent commander. (AE XX at 21; AE XVII at 16).

In examining the defense's probable cause challenge to the two search authorizations, the Military Judge did find the second search authorization to be a "closer call" than the first because of the tenuous link between the offenses alleged on 12 August 2022 and the cell phones carried by SrA Johnson. (App. Ex. XX at 25). He pointed to the contents of SrA Johnson's vehicle and his possession of two phones during the alleged incident as the facts that "saves this evidence for the Government." (App. Ex. XX at 25). He found that these facts established a sufficient nexus between SrA Johnson's alleged offense and the phones to be searched. (App. Ex. XX at 25). The Military Judge's ruling did not mention a nexus between the unnamed intruder in Incirlik and SrA Johnson's phones. (App. Ex. XX).

The Military Judge went on to determine that, aside from upholding the probable cause determination, he also found that the good faith exception would apply. (App. Ex. XX at 26). He based this finding on the OSI agents providing sufficient facts to Col JF to put "meat on the bones of their conclusions." (App. Ex. XX at 27). He also found that Col JF did not act as a "rubber stamp" for OSI. (App. Ex. XX at 27). He determined that the affidavits presented to Col JF had only minor typographical errors and omissions that were more "form over substance." (App. Ex. XX at 27).

Additionally, the Military Judge determined that exclusion was inappropriate in this case as it would not appreciably deter future unlawful searches (App. Ex. XX at 27). He also found that any such deterrence would not outweigh the costs to the justice system of excluding the evidence (App. Ex. XX at 27).

Standard of Review

R.C.M. 905 requires motions to suppress evidence be raised before pleas are entered. R.C.M. 905(b)(3). Failure to raise such motions shall constitute forfeiture absent an affirmative waiver. R.C.M. 905(e)(2). Appellate courts review a forfeited issue for plain error. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004).

Courts review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). Courts review the military judge's findings of fact for clear error and conclusions of law *de novo*. *Id*.

Law and Argument

"Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization, . . . , is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces." Mil. R. Evid. 315(a).

A search authorization is "express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence or person." Mil. R. Evid. 315(b)(1). A search authorization is valid only if issued by an impartial individual in one of the categories outlined in Mil. R. Evid. 315(d)(1) or (d)(2). Mil. R. Evid. 315(d). The first of these categories competent to issue search authorizations is a "commander . . . who has control over the place

where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law." Mil. R. Evid. 315(d)(1).

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. U.S. Cons. amend. IV. For there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific items to be seized. *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017).

When an appellate court reviews a commander's probable cause determination, they examine whether the commander had a substantial basis for concluding that probable cause existed. *United States v. Rogers*, 67 M.J. 162, 164-65 (C.A.A.F. 2009). A substantial basis exists when "based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime would be found at the identified location." *Id*. at 165. A reviewing court may conclude that the commander's probable cause determination reflected an improper analysis of the totality of the circumstances. *United States v. Leon*, 468 U.S. 89, 915 (1984).

In terms of the scope of a search, modern computer technologies, such as cell phones and laptops, present challenges well beyond computer disks, storage lockers, and boxes. *United States v. Wicks*, 73 M.J. 93, 102 (C.A.A.F. 2014). The vast amount of data that can be stored and accessed and the myriad ways they can be sorted, filed, and protected make a container analogy problematic when discussing one of these modern devices. *Id*. "The potential invasion of privacy in a search of a cell phone is greater than in a search of a 'container' in a conventional sense" because a cell phone can provide access to a "vast body of personal data." *Id*. (quoting *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012)).

Evidence that would otherwise be suppressed for lack of probable cause is admissible if it meets a limited number of exceptions to the exclusionary rule. One such exception is for

evidence that inevitably would have been discovered during police investigation without the aid of the illegally obtained evidence. *Wicks*, 73 M.J. at 103 (internal citations omitted). For the inevitable discovery doctrine to apply, the Government must demonstrate by a preponderance of the evidence that "when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence" in a lawful manner. *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012).

The good faith exception permits the admission of evidence that, although unlawfully obtained, resulted from the good-faith reliance of law enforcement agents on a search authorization. *United States v. Mancini*, No. ACM 38783, 2016 CCA LEXIS 660, at *24 (A.F. Ct. Crim. App. Nov. 7, 2016). The good-faith exception allows the use of such evidence if: a) the search resulted from an authorization to search issued by competent authority; b) the individual issuing the authorization had a substantial basis for determining the existence of probable cause; and c) the officials seeking and executing the authorization reasonably and with good faith relied on the issuance of the authorization or warrant. Mil. R. Evid. 311(c)(3). The good-faith exception will not apply when the authorization is so facially deficient, such as when it fails to particularize the place to be searched or things to be seized, that the executing officers cannot reasonably presume it to be valid. *United States v. Lopez*, 35 M.J. 35, 41-42 (C.M.A. 1992).

The exclusionary rule is a judicially created remedy for violations of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914). The rule applies to evidence directly obtained through violation of the Fourth Amendment as well as evidence that is the indirect product or "fruit" of unlawful police activity. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The exclusionary rule applies only where it results in appreciable deterrence for future

Fourth Amendment violations and where the "benefits of deterrence must outweigh the costs." *Herring v. United States*, 555 U.S. 135, 141 (2009).

A. The Military Judge Commit Plain Error in Failing to Suppress Evidence from Appellant's Cell Phones Where the Searches Were Authorized by an Individual Without Control over the Place Where the Property to be Searched Was Situated.

Mil. R. Evid. 315 grants the authority to authorize searches to the commander who has "control over the place where the property or person to be searched is situated or found." Mil. R. Evid. 315(d)(1). Only if that place is not under military control does the rule grant that authority to the commander "having control over persons subject to military law." Mil. R. Evid. 315(d)(1). Col JF was initially asked only for authority to search the contents of the phone found on SrA Johnson—the iPhone 7. (AE XVII at 43). Presumably, the commander who had control over the TLF facility was asked to grant a search authorization for the items found in the TLF room, including the iPhone 13 Max found on the floor. (R. at 191, 193). The record does not include this document, but SA AP testified that his affidavit was used to support more than one search authorization, including a second for the contents of the TLF room. (R. at 191, 193).

Several days later, Col JF was asked to expand the scope of the authorization to allow for a search of both phones and a greater analysis of these phones. As a result of this second authorization, a search of the iPhone 13 Max uncovered a great deal of evidence that the Government offered not only to support the offenses related to DF but also led to the additional charge (R. at 227, 229; Charge Sheet).

Col JF did not have the authority to issue either search authorization in this case. He did not have control over the place where the person or property to be searched was situated or found. SrA Johnson, his clothing, and his iPhone 7 were found in the TLF room. Col JF, as SrA Johnson's commander did not have the authority to authorize the search of his clothing or

iPhone 7 on the first authorization. The commander having control over the TLF would have had that authority.

Even if this Court determines that Col JF had the authority to issue a search authorization for SrA Johnson's clothing and items found in his possession by virtue of being his commander, he certainly did not have the authority to grant any type of search of the iPhone 13 Max in the second authorization.

First, this item was found on the floor of the TLF room and not in SrA Johnson's possession. There was no way to determine its ownership until it was searched. The proper commander competent to authorize its search would have been the commander with control over the TLF where it was found. SA AP seemed to understand this distinction, as he separated the search authorizations into items found in the room and items found on SrA Johnson's person. (R. at 191, 193). He only presented the authorization for the items in SrA Johnson's possession to Col JF. (AE XVII at 43). The affidavit covered all items sought to be searched, including both phones, but was used to support separate authorizations. (R. at 191, 193).

Second, by the time the second authorization was presented to Col JF, both iPhones were in an OSI office in Germany. (AE XVII at 48). Col JF certainly had no control over the place where the items to be searched were situated at that time.

Col JF was not the commander competent to allow a search of either iPhone, but especially not of the iPhone 13 Max. A similar fact pattern was discussed by the Navy-Marine Corps Court of Criminal Appeals in *United States v. Irvin*, 80 M.J. 722 (N-M. Ct. Crim. App. 2020). In that case, when the accused was placed into pretrial confinement, his phone and Apple Watch were turned over to his command, a training squadron aboard NAS Meridian, Mississippi. *Id*. at 727. The investigator requested that the Commanding General of Training Command, the superior commander with authority over the accused's squadron, grant a search authorization for the contents of the phone and watch. *Id*. At trial and on appeal, the defense

argued that the Commanding General of Training Command did not have authority over NAS Meridian, where the phone was located. *Id*. The appellate court held that while the Commanding General of Training Command did not have authority over all of NAS Meridian, he did have control over the personnel and property of the subordinate training squadron. *Id*. at 729. Because the squadron possessed the phone and watch after the accused was placed in pretrial confinement, the Commanding General had the authority to issue the search authorization. *Id*.

The facts here run entirely counter to Irvin's facts. At no time did SrA Johnson's command have possession of either of his iPhones. They were both seized by law enforcement before any verbal or written authorizations were issued. Col JF never had authority over the place where the phones were found—not when they were initially seized, nor when they were held by OSI. He was not the proper commander to issue search authorizations for property found outside of the locations over which he exercised control.

In some cases, despite a lack of actual authority, the courts will apply the good faith exception when officers executing a search authorization reasonably believe that the issuing authority has authority over the place to be searched. *United States v. Chapple*, 36 M.J. 410, 414 (C.A.A.F. 1993). In this case, however, the officers executing the search authorization could not have reasonably believed that Col JF had authority over the TLF room or the OSI office in Germany. SA AP definitely knew that Col JF had no authority to issue a search authorization for the iPhone 13 Max because he applied for a search authorization for that phone along with the rest of the contents of the TLF room on a separate search authorization not presented to Col JF. (R. at 191, 193). When SA JA picked up the case, he had access to the previous search authorizations drawn up in the case, whether they were signed or not. He would have known that the commander of the 31st Medical Group did not possess authority over items found in the Temporary Lodging Facility or in OSI offices in Germany. The good faith

exception cannot apply to these agents in this case. Any belief that SA JA held that Col JF could now authorize the search of the iPhone 13 when he could not when SA AP was working the case was unreasonable.

The Military Judge's determination that Col JF had the authority to issue search authorizations for both the iPhone 7 and the iPhone 13 Max was erroneous. (AE XX at 21). The error was plain, particularly as applied to the iPhone 13 Max found on the floor of the TLF room. This error was to SrA Johnson's material prejudice as the evidence obtained from the iPhone 13 Max included not only several photos of feet from 12 August 2022, but many other photos of feet admitted as under Mil. R. Evid. 404(b). Further, videos from the iPhone 13 Max were used to charge and convict on the additional charge. The use of this tainted evidence permeated SrA Johnson's trial to his great prejudice.

B. The Military Judge Abuse His Discretion in Denying the Defense Motion to Suppress Evidence from Appellant's Cell Phones that Predated the 12 August Charged Offenses.

Should this Court determine that Col JF did possess authority to authorize the search of SrA Johnson's two cell phones or that the good faith exception applies on that issue, the evidence found on SrA Johnson's iPhone 13 Max in the period before the charged offenses should still have been suppressed at trial.

In this case, the Military Judge abused his discretion in denying the defense motion to suppress the evidence found on SrA Johnson's phones that predated the 12 August 2022 incident. While the Military Judge found Col JF's probable cause determination for the geolocation data in the first authorization to be correct, he found the determination for the second authorization to be a "closer call." (App. Ex. XX at 25). In analyzing the evidence that ultimately led him to find probable cause, the Military Judge pointed exclusively to evidence concerning SrA Johnson's actions on 12 August 2022. (App. Ex. XX at 25-26). He pointed to the items found in SrA Johnson's car and the belief that while he left behind several items that

might identify him or alert someone to his presence, SrA Johnson intentionally brought two cell phones with him. (App. Ex. XX at 25). These were the facts he pointed to while trying to find the required nexus between the 12 August 2022 offense alleged and the two phones. (App. Ex. XX at 25-26). Yet, Col JF was presented with no evidence showing that SrA Johnson had used his cell phones in the commission of a crime. This left Col JF with nothing more than intuitive guesswork: individuals carrying out a crime while possessing a cell phone must have used the phone in a criminal manner. *See United States v. Hoffman*, 75 M.J. 120, 127 (C.A.A.F. 2016) (holding that investigator's belief that there is an intuitive relationship between solicitation of a minor and possession of child pornography insufficient to establish probable cause to search accused's computer).

The nexus between SrA Johnson's cell phones and the alleged crimes is even more attenuated than that found in *United States v. Toledo*, a case where this Court found a lack of probable cause to search the accused cell phone. No. ACM 39232, 2018 CCA LEXIS 497, at *17 (A.F. Ct. Crim. App. Oct. 16, 2018) (unpub. op.) In that case, the accused had solicited sexual acts from an undercover agent posing as a minor on the internet. *Id.* at *3. The accused expressed an intent to film the sex acts and showed up at their planned meeting place with a camera and cell phone before getting apprehended by law enforcement. *Id.* at *5. This Court found that "[t]here was no direct factual link between [Toledo]'s interactions with [the undercover officer] and any data stored on [Toledo]'s camera or camera memory card." *Id.* at *17. Similarly, "[t]here was no factual basis showing that [Toledo] actually produced child pornography with his video camera and stored it on the camera memory card." *Id.* at *18. This Court found that this deficiency precluded any basis for a judge to find probable cause and issue a warrant. *Id.* In this case, the military judge was presented with no basis to show that SrA Johnson's cell phones had been used to record anything or commit any crime. Like *Toledo*,

this lack of a factual basis that SrA Johnson had used his cell phones in any particular manner undermined a finding of probable cause.

Moreover, The Military Judge did not discuss how these facts created a nexus between the 29 December report on Incerlik and SrA Johnson's cell phones. (App. Ex. XX). *See Nieto*, 76 M.J. at 107 (finding insufficient nexus between the alleged crime of unlawful video recording with a cell phone and laptop found in the accused's bunk.) While SA JA had spoken to the OSI agents in Incerlik about a report of an individual caught in someone's room without permission, he had made no other apparent efforts to tie SrA Johnson to that report. There was no evidence that SA JA provided a photo of SrA Johnson to identify him as the perpetrator. (R. at 200-15). There was no evidence that SA JA checked whether SrA Johnson was physically in Incerlik during the 29 December 2021 incident. (R. at 200-15). Unlike the 12 August 2022 incident, there was no indication that the individual in Incerlik was even carrying, let alone using, a cell phone. (R. at 212). Had an OSI agent sought a search authorization for SrA Johnson's cell phones based entirely on the vague report from Incerlik, a common-sense judgment would have never led to the conclusion that there was a fair probability that evidence of a crime would be found on his phones. Like *Nieto*, the lack of a nexus between the cell phones and the commission of any of the crimes alleged at Incirlik or Aviano was fatal to the military judges finding probable cause. 76 M.J. at 107.

When Col JF testified about his decision-making process on the second authorization, he mentioned that he had been told that there had been other "incidents" at a prior duty station of SrA Johnson's. (R. at 152). He did not seem to know where that location was. (R. at 158). He did not seem to know any details of the incidents reported. (R. at 158). He did not know whether SrA Johnson had been identified or implicated in any way in those offenses. (R. at 158). He did not know whether SrA Johnson was at the duty station at the time of the reported incidents. (R. at 169). No information concerning these alleged incidents was included in SA

JA's affidavit for the search authorization. (R. at 159). He had even less information than the Military Judge did about the 29 December 2021 report. Indeed, Col JF insisted that the sole basis for his authorization to expand the search of SrA Johnson's phones was that he possessed two cell phones on 12 August 2022. (R. at 160). He did not testify about the reason for granting the search over the expanded date range. (R. at 147-71). This left the Military Judge with nothing to support the eight months of all communications and media the Special Agent sought to examine. Instead, the Military Judge pointed to the details of 12 August 2022 and did not address the date range in his ruling. (App. Ex. XX).

While this Court may well find that Col JF had a substantial basis for concluding that probable cause existed to search SrA Johnson's cell phones for communications and created media on 12 August 2022, the same cannot be said for the period from 29 December 2021 to 11 August 2022. Even if this Court decided that the report from Incerlik provided probable cause to search the phones for communications and media on 29 December 2021, there could be no substantial basis for probable cause to search the dates between 30 December 2021 and 11 August 2022.

SA JA stated that he wanted to search the phones to determine whether SrA Johnson had been in other buildings or rooms on his way from his car to DF's room. (R. at 205). He wanted to see if there was evidence from Incerlik. (R. at 208). He also testified that he was looking for other victims. (R. at 208). Without any reported offenses or evidence of other crimes, there was no probable cause to believe that SrA Johnson's phones would have evidence of any offenses between 30 December 2021 and 11 August 2022. Any examination of the phones for the time frame before 12 August 2022 was entirely a fishing expedition and not based upon probable cause. It is precisely this type of "wide-ranging exploratory search [which] the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Without a fair probability that evidence of a crime would be found at the identified location in

a search between 29 December 2021 and 11 August 2022, the Military Judge's finding of probable cause for this expanded search authorization is an abuse of his discretion.

The Military Judge determined that the good faith doctrine applied even if probable cause did not exist to justify the search authorization. (App. Ex. XX at 26). Despite the Military Judge's finding that SA JA's affidavit contained only minor typographical errors and omissions that were merely "form over substance," the affidavit left out a substantial matter. It contained no information as to why the date range covered the period of 29 December 2021 to 12 August 2022. (R. at 159). Although SA JA testified that he'd explained the Incerlik incident and the resulting date range to Col JF, the commander certainly had only a cursory idea of the matter. (R. at 158). He also insisted that any incidents at a prior duty station were not the basis for his grant of the expanded authorization. (R. at 160). This omission of why the Special Agent sought to search an eight-month period instead of a 24-hour one is substantial.

The good-faith exception should only apply if: a) the search resulted from an authorization to search issued by competent authority; b) the individual issuing the authorization had a substantial basis for determining the existence of probable cause; and c) the officials seeking and executing the authorization reasonably and with good faith relied on the issuance of the authorization or warrant. Mil. R. Evid. 311(c)(3). Even if Col JF was a competent authority to grant the right to search, he did not have a substantial basis for determining the existence of probable cause as it relates to the date range between 29 December 2021 and 11 August 2022. Although the Military Judge determined that Col JF did not operate as a rubber stamp because the Special Agent had put enough "meat on the bones of their conclusions" to justify probable cause, this meat and these conclusions were exclusively related to 12 August 2022. Col JF likely felt justified in granting authorization to search for evidence pertaining to the 12 August 2022 incident, but there were no conclusions, there was no meat,

for the period before that. His authorization to expand the search over these eight months was without justification or support and was a rubber stamp on the OSI agent's request.

SA JA also could not have reasonably and with good faith relied upon the issuance of the authorization knowing that he had provided little to no information to justify a search for 29 December 2021 and no information to justify a search of SrA Johnson's phones for the period 30 December 2021 to 11 August 2022. When an authorization is facially deficient, the executing officers cannot reasonably presume it to be valid. *Lopez*, 35 M.J. at 41-42; Mil. R. Evid 311(c)(B) (requiring a substantial basis for determining the existence of probable cause for the good faith exception to apply). This authorization was facially deficient because the scope of the search was unreasonably broad. The good faith exception does not apply to the period from 29 December 2021 to 11 August 2022, and the Military Judge's determination that it did was an abuse of his discretion.

The Military Judge further determined that even if the search was unlawful and the good faith exception did not apply, the evidence found on SrA Johnson's phones should still not be subject to the exclusionary rule. (App. Ex. XX at 27). Part of the reason he did not apply the exclusionary rule was that the evidence found on SrA Johnson's phones had proven the agents' and Col JF's judgment and decisions right. (App. Ex. XX at 28). This thinking is the very reason why exclusion is the best way to deter future violations of the Fourth Amendment. The rule cannot be that no warrant must issue, but upon probable cause, unless law enforcement's guess was correct and they find incriminating evidence. The fact is, the expanded search did find evidence related to the 12 August 2022 incident but did not find evidence matching the report from Incerlik or evidence of other victims on 12 August 2022. The videos and pictures on SrA Johnson's phones for the dates before 12 August 2022 were found as a result of a successful fishing expedition, but a fishing expedition, nonetheless. This type of fishing expedition must be deterred.

This is not a case where exclusion carries a high cost to the justice system. The charges related to the original incident that spurred the investigation would still be viable. The 4 August 2022 video, which was offered as Mil. R. Evid. 404(b) evidence of SrA Johnson's intent in the Article 129, UCMJ, offense would be lost, but as he was acquitted of the greater offense and found guilty only of unlawful entry, that video would be irrelevant in a retrial. The only offense affected would be the Additional Charge. Indeed, there is a cost whenever an offense with a named victim cannot be retried, but in this case, this victim was unaware of what had happened until the investigation brought it to light. Had Col JF appropriately determined that probable cause did not exist to search SrA Johnson's phones for the expanded date range, he would never have known that the taping occurred. In this case, the benefit of deterring agents from taking fishing expeditions through digital evidence in hopes of finding something incriminating is greater than the cost to the justice system. The evidence from the phones that predates 12 August 2022 and all derivative evidence should be excluded.

Request for Relief

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and sentence and authorize a rehearing without the evidence from the SrA Johnson's cell phones that predates 12 August 2022.

II.

THE DELAY OF 195 DAYS BETWEEN THE IMPOSITION OF PRETRIAL RESTRAINT AND ARRAIGNMENT VIOLATED APPELLANT'S ARTICLE 10 AND R.C.M. 707 SPEEDY TRIAL RIGHTS.

Additional Facts

On 12 August 2022, SrA Johnson was apprehended by Security Forces personnel. (R. at 418). He was later released into the custody of his unit. (App. Ex. III). He was restricted and guarded until being placed into pretrial confinement on 15 August 2022. (App. Ex. III). The command legal office had not had an airman placed into pretrial confinement in four years and

had to update memos, get training for the pretrial confinement review officer, and find a place to confine SrA Johnson. (R. at 70).

OSI interviewed DF on 12 August 2022. (App. Ex. VI at 36). His room was searched, and evidence gathered on 12 August 2022. (R. at 177). The lead agent had arrived and begun his investigation by 14 August 2022. (R. at 452). The digital forensics analyst received SrA Johnson's cell phones on 17 August, accessed the iPhone 13 by 24 August, and began his analysis of the iPhone 13 on 7 September 2022. (R. at 223, 225). SrA Johnson was assigned a military defense counsel on 12 August 2022. (App. Ex. XVII at 66). SrA Johnson then provided law enforcement with a notice of representation that included a request for speedy trial. (App. Ex. XVII at 66).

The command legal office included five Captains, one Major, and one Lieutenant Colonel. (R. at 22). Four of the officers in the office were prosecutors. (R. at 54). They were also supported by six reservists, five of them officers. (R. at 23). Between August 2022 and February 2023, the office had two trials. (R. at 28). One was a urinalysis Special Court-Martial, and the other was a guilty plea at a Summary Court-Martial. (R. at 29).

Despite the prosecutors and resources available, the Government did not assign an Assistant Trial Counsel or request that a Circuit Trial Counsel be assigned to the case until 3 October 2022. (App. Ex. VI at 57; R. 57). The Government did not send the first draft proof analysis to the Third Air Force Judge Advocate's Office until 23 September 2022. (App. Ex. VI at 51). The Chief Circuit Trial Counsel sent the first draft charges for review on 3 October 2022. (App. Ex. VI at 58). These draft charges went back and forth between the Government counsel and various reviewing offices until 24 October 2022. (App. Ex. VI at 2-3).

The original charges in this case were finally preferred on 28 October 2022, 77 days after the imposition of pretrial restraint. (Charge Sheet). The trial counsel contacted the defense the same day and informed them that the Government's "ready date" for an Article 32, UCMJ,

hearing was 7 November 2022. (App. Ex. VI at 55). On 12 December 2022, the defense counsel proposed that the hearing be held at the end of December. (App. Ex. VI at 108). The Preliminary Hearing Officer was then appointed on 19 December 2022. (App. Ex. VI at 112). The Article 32, UCMJ, hearing was conducted on 28 December 2022, and the report was submitted on 12 January 2023. (App. Ex. VI at 139).

On 20 January 2023, the Government sought to exclude time for R.C.M. 707 purposes from the Special Court-Martial Convening Authority (SPCMCO). (App. Ex. VI at 149). The SPCMCO excluded from 11 October 2022 through 6 November 2022, a total of 27 days, to allow for time to identify and secure other evidence from a substantial witness, ZP. (App. Ex. VI at 149). He also excluded from 7 November 2022 through 27 December 2022, a total of 51 days, due to defense counsel's unavailability for a required Article 32 preliminary hearing. (App. Ex. VI at 149).

On 1 February 2023, the Government notified the defense that their first available date for trial was 20 February 2023. (App. Ex. 1 at 70). Trial began on 1 May 2023. (R. at 325). At trial, the defense moved for dismissal based upon violating Article 10, UCMJ, and R.C.M. 707. (App. Ex. 1). The Military Judge denied the motion. (App. Ex. XII).

Standard of Review

Appellate courts review *de novo* whether an appellant was denied his right to a speedy trial under Article 10, UCMJ, and R.C.M. 707 as a matter of law. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999).

Law and Argument

A. Article 10, UCMJ.

Article 10, UCMJ, states: When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. Article 10(b)(1),

UCMJ (2019). Trial stops the speedy trial clock under Article 10, UCMJ. *United States v. Cooper*, 58 M.J. 60 (C.A.A.F. 2003). When reviewing claims of a denial of speedy trial under Article 10, UCMJ, appellate courts do not demand constant motion but reasonable diligence in bringing the charges to trial. *Mizgala*, 61 M.J. at 127. The Court of Appeals for the Armed Forces has determined that factors from *Barker v. Wingo*, 407 U.S. 514 (1972) provide an appropriate lens through which to analyze an alleged Article 10, UCMJ, violation. *Mizgala*, 61 M.J. at 127.

The four factors provided by *Barker* are: 1) the length of the delay; 2) the reasons for the delay; 3) whether the appellant made a demand for speedy trial; and 4) prejudice to the appellant. *Id*. at 129. In this case, the first factor weighs in favor of the defense. SrA Johnson was in pretrial confinement for 195 days before he was arraigned on 25 February 2023. (App. Ex. VI at 177). The length of the delay is sufficient to trigger the full *Barker* inquiry.

Several factors caused the delay. The Government took 77 days to prefer the original charges in this case. (Charge Sheet). Although the Government argues that the investigation that led to the Additional Charge caused much of the delay, they were not aware of the 10 August 2022 video until 11 October 2022. (App. Ex. VI at 62). At that point, it had already been 60 days since SrA Johnson had been placed into pretrial confinement without any charges preferred. (R. at 418). The Government did not request that a circuit trial counsel be detailed until 3 October 2022, 52 days after SrA Johnson was placed into pretrial confinement. (R. at 57). Once the original charges were preferred, the Government notified the defense that they would be ready to conduct the Article 32, UCMJ, hearing on 7 November 2022. (App. Ex. I at 55). The Government then waited until 12 December 2022 for the defense to propose a date for the Article 32, UCMJ, hearing. (App. Ex. VI at 108). An Article 32, UCMJ, Preliminary Hearing Officer was not appointed until 19 December 2022. (App. Ex. VI at 112). The hearing was conducted on 28 December 2022, and the report was not provided until 12 January 2023.

(App. Ex. VI at 139). On 20 January 2023, the additional charge was preferred. (Charge Sheet). This charge was referred on 24 January 2023. (Charge Sheet). The Government then notified the defense on 1 February 2023 that the first date the Government was available to arraign SrA Johnson was 20 February 2023. (App. Ex. VI at 153).

Despite the presence of digital evidence in this case, the Government's delay appears to have come from an office unprepared to address pretrial confinement and serious offenses. Instead of taking the evidence available by 18 August 2022 and preferring the original charges, the Government waited 77 days. They blame the analysis of SrA Johnson's phone, but analysis of the iPhone 13 began on 7 September 2022. (R. at 225). Evidence related to the offense on 12 August 2022 would have been simple to locate, as the forensic software allowed an examiner to focus the contents by date. (R. at 230). Once the Government had the photos taken by SrA Johnson of DF's feet on 12 August 2022, they could have moved forward with those charges. The delay in determining the identity of ZP only arose because the Government had already delayed so long in preferring the original charges.

The investigation into ZP's identity also appeared to be unnecessarily drawn out. On 11 October 2022, the Government became aware of the video filmed on 10 August 2022. (App. Ex. VI at 62). By 25 October 2022, the Government had the sign-in rosters for the Wyvern Fitness Center from the morning of 10 August 2022. (App. Ex. VI at 79). The list from the Fitness Center was narrowed down to 27 potential individuals on 26 October 2022. (App. Ex. VI at 80). Despite ZP being only the third individual on the list whom OSI spoke to, he was not interviewed until 2 December 2022. (R. at 463; App. Ex. VI at 105). The myriad reasons for the Government's delay in processing this case cause this factor to also weigh in favor of the defense.

SrA Johnson made demands for speedy trial on two occasions. First, on 12 August 2022, he provided a memorandum informing law enforcement that military counsel represented

him. (App. Ex. XVII at 66). Along with revoking any consent to search or seize his person or property, SrA Johnson demanded a speedy trial. (App. Ex. XVII at 66). On 2 February 2022, counsel for SrA Johnson again demanded speedy trial in their initial discovery request. (App. Ex. I at 72). This factor also weighs in favor of the defense.

Finally, SrA Johnson suffered prejudice due to this unnecessary delay. Prejudice is assessed in the light of the interests of the defendants whom the speedy trial right is intended to protect. *Barker*, 407 U.S. at 532. Three such interests include: 1) preventing oppressive pretrial incarceration; 2) minimizing anxiety and concern of the accused; and 3) limiting the possibility that that defense will be impaired. *Id*. In other cases, prejudice was not found because the pretrial confinement was not unduly harsh, and the accused suffered no anxiety and concern greater than that inherent in pretrial confinement itself. *United States v. Cossio*, 64 M.J. 254, 257-58 (C.A.A.F. 2007). SrA Johnson's case, however, is different. While in confinement, SrA Johnson had difficulty accessing his attorneys, all of whom were located outside of where he was confined at Sembach Kaserne, Germany. (App. Ex. I at 2). He could also not access electronic resources to any significant degree to assist in his defense. (App. Ex. 1 at 2). SrA Johnson also suffered from medical trauma while in confinement, including trouble breathing, inability to sleep, soreness in his throat, and chest pains. (App. Ex. V). Despite raising these issues, SrA Johnson was not provided with a medical evaluation. (App. Ex. V). SrA Johnson's increased anxiety and concern are understandable, given that he spent 77 days in confinement before even being notified of charges against him. (Charge Sheet). These effects of his confinement are entirely encompassed by the concerns expressed in *Barker*. This factor also weighs in favor of the defense.

As each of the four *Barker* factors weigh in favor of the defense, SrA Johnson asks this Court to find that the Government failed to meet its duty of reasonable diligence in his case. The Government did not have a legitimate reason to wait 52 days to request the detailing of a

Circuit Trial Counsel. The Government did not have a legitimate reason for waiting for 77 days to prefer the original charges. The slow movement of the investigation into identifying ZP belies the Government claim that the preferral and referral of the original charges were delayed by this investigation. The Government did not have a legitimate reason not to appoint a Preliminary Hearing Officer and set a date for the Article 32, UCMJ, hearing once the original charges were preferred. If the defense was unavailable on that date, they could have submitted a request for delay. Until the defense requests delay, it is incumbent upon the Government to proceed towards trial with reasonable diligence. The Government did not have a legitimate reason to wait an additional 19 days to be ready to arraign SrA Johnson once both sets of charges were preferred and referred.

SrA Johnson was in pretrial confinement on the night of 12 August 2022 based on his alleged offenses. Once they confined him, the Government was required to move with reasonable diligence toward trial for those offenses. The Government did not. Instead, they took their time, fished for evidence of additional offenses, and delayed the investigation into the 10 August video. SrA Johnson asks this Court to find a violation of his Article 10, UCMJ, right to a speedy trial.

B. R.C.M. 707.

An accused must be brought to trial within 120 days after the imposition of restraint under R.C.M. 304(a)(2)-(4). R.C.M. 707(a). Arraignment stops the speedy trial clock for purposes of R.C.M. 707. *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2007). The convening authority and military judge both have authority to exclude time for purposes of computing the R.C.M. 707 speedy trial clock. R.C.M. 707(c). Before referral, requests for excludable delay may be made to the convening authority. R.C.M. 707(c)(1). Reasons for granting excludable delay include time to enable counsel to prepare for trial in complex cases, time to allow examination into the mental capacity of the accused, time requested by the

defense, time to secure the availability of the accused, substantial witnesses, or other evidence, or time to obtain security clearances for access to classified information. Discussion to R.C.M. 707 (2019). When the Government requests excludable delay after the fact, the request will be viewed with considerable skepticism if it appears to be a rationalization for neglect or willful delay. *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

The Government did not arraign SrA Johnson within 120 days of the imposition of pretrial confinement. Although the SPCMCO granted *post hoc* excludable delay that brought the R.C.M. 707 clock just under the 120-day requirement, those after-the-fact requests should indeed be viewed skeptically by this Court. *See United States v. Proctor*, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003). In particular, the 27-day delay was granted to allow for time to identify and secure other evidence from a substantial witness, ZP. (App. Ex. VI at 149). Although the Government became aware of the 10 August video that eventually led to the Additional Charge on 11 October 2022, they did not take substantial steps to identify the individual depicted or to advance the investigation between 11 October 2022 and 6 November 2022. During this time, the Government received the sign-in roster from the Fitness Center and narrowed the list down to 27 individuals. (App. Ex. VI at 79-80). Then, nothing else happened until 28 November, when SA JA further narrowed down the list and passed it to the OSI Detachment at Aviano to screen the individuals on the list. (App. Ex. VI at 98).

The time frame excluded due to the defense unavailability should also be closely scrutinized. Although the Government claimed to be ready to proceed to an Article 32, UCMJ, hearing on 7 November 2022, they did not have a Preliminary Hearing Officer appointed until 19 December 2022. (App. Ex. VI at 112). They did not schedule the Article 32, UCMJ, hearing and require the defense to request excludable delay. Instead, the Government was content to wait for the defense to provide a date. The only dates that should be excluded should be from

12 December 2022 to 28 December 2022 after the defense indicated that is when they would be available.

Based on the apparent attempts by the Government to rationalize its inability to get SrA Johnson to arraignment within 120 days of the imposition of pretrial confinement, this Court should discount the delay excluded by the SPCMCO and find a violation of SrA Johnson's R.C.M. 707 right to a speedy trial.

Request for Relief

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and sentence and dismiss the findings with prejudice.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE GOVERNMENT TO ADMIT PICTURES AND VIDEOS UNDER MIL. R. EVID. 404(b).

Additional Facts

At trial, the Government notified the defense of its intent to admit several uncharged acts as evidence under Mil. R. Evid. 404(b). (App. Ex. XV at 20-22). In addition to several videos filmed on 10 August 2022, which appear to be taken at the same location and at the same approximate time as the video which formed the basis for the Additional Charge, the Government sought to admit: 1) a video from 8 August 2022 in what appears to be the same male locker room; 2) the fact that SrA Johnson's phone contained hundreds of photos and videos of feet; and 3) photos and videos taken on 4 August 2022 from outside a window. (App. Ex. XV at 21-22).

The defense moved to preclude admission of these three items. (App. Ex. XV). The Government argued that the 8 August 2022 video was evidence of SrA Johnson's identity, his common scheme and plan, and knowledge regarding the 10 August 2022 video from apparently the same location. (R. at 308). The Government also argued that testimony concerning the

hundreds of photos of feet showed SrA Johnson's motive and intent to assault DF when he entered his room. (R. at 310). Finally, the Government argued that the 4 August 2022 recordings and pictures showed a common scheme, plan, and preparation, as well as SrA Johnson's intent to break into DF's room and touch his feet. (R. at 312).

The defense argued that the acts in the 8 August 2022 and 4 August 2022 videos were not similar enough to the charged offenses to be considered part of a common scheme or plan. (R. at 315, 318). The defense also argued that the photos and videos of feet did not make it more likely that SrA Johnson entered DF's room to assault him. (R. at 317). None of the pictures depicted a person touching the feet or, in any other way, assaulting an individual. (R. at 317).

The Military Judge denied the defense motion. (App. Ex. XXII). He ruled that the 4 August video and pictures were not similar enough to be considered part of a common scheme or plan but would be admissible as evidence of preparation and intent. (App. Ex. XXII at 12). He also found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or any other Mil. R. Evid. 403 factor. (App. Ex. XXII at 12). The Military Judge also ruled to admit the 8 August video. (App. Ex. XXII at 13-14). He determined that the video was evidence of identity because it associated SrA Johnson with shoes seen in the 10 August video. (App. Ex. XXII at 13). He also found the video evidence of a common scheme or plan. (App. Ex. XXII at 13-14). Again, he determined that the probative value was not outweighed by the danger of unfair prejudice. (App. Ex. XXII at 14). Finally, the Military Judge found the evidence concerning the photos and videos of feet found on SrA Johnson's phones to be evidence of intent and motive. (App. Ex. XXII at 14). He again found that the probative value of this evidence was not outweighed by the danger of unfair prejudice. (App. Ex. XXII at 14).

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). "A military judge abuses his discretion when: 1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; 2) if incorrect legal principles were used; or 3) if his application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

Law and Argument

"Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion, the person acted in accordance with the character." Mil. R. Evid. 404(b)(1). Evidence of other acts may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Mil. R. Evid. 404(b)(2). A military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the factfinder, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403.

To be admissible at trial, uncharged conduct must satisfy the three *Reynolds* factors. *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). First, the evidence must reasonably support a finding by the fact-finder that Appellant committed the prior acts. *Id*. at 109. Second, the admission of the prior acts must make a fact of consequence more or less probable. *Id*. Third, the danger of unfair prejudice must not substantially outweigh the probative value. *Id*.

Uncharged acts sought to be admitted as evidence of a plan or common scheme must be shown to be more than similar to the charged offenses. *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984). The uncharged acts must be "almost identical" to the charged acts to naturally suggest that all of these acts resulted from the same plan. *Id*.; *United States v.*

Rappaport, 19 M.J. 708, 713 (A.F.C.M.R. 1984) ("To be admissible to show a common scheme or plan, the other offenses must be more than similar; they must be almost identical, with a concurrence of common features, and so interconnected as to naturally suggest that all of the acts were the result of the same plan or design.")

The Military Judge abused his discretion when he allowed the Government to admit the challenged evidence under Mil. R. Evid. 404(b). The evidence admitted was cumulative to evidence of the offenses themselves or to other evidence offered under Mil. R. Evid. 404(b) that was not challenged. The admitted evidence had little to no probative value, were evidence of propensity not intent, and were prejudicial to SrA Johnson. *United States v. Wilson*, No. 23-0225, 2024 CAAF LEXIS 287, at *27 (C.A.A.F. May 23, 2024) (holding that evidence offered to show intent under Mil. R. Evid. 404(b) which is cumulative with evidence already admitted has limited probative value which weighs against admission.)

The video recorded on 8 August 2022 was admitted to show a common scheme or plan and prove SrA Johnson's identity. (R. at 308). However, the defense did not challenge the evidence presented in videos taken on 10 August 2022 that showed SrA Johnson's face and shoes. (App. Ex. XV). These videos explicitly identified SrA Johnson and put him with the phone in the locker room at the time of the charged offense. (Pros. Ex. 10). Further, the Government entered evidence taken from SrA Johnson's iPhone 7 to correlate his location data on 10 August with the filming of the video in the locker room. (Pros. Ex. 14). SrA Johnson's identity as the individual filming in the locker room was well-established without need to admit evidence that served to prejudice SrA Johnson by showing another incident from the locker room. With SrA Johnson's identity established, the videos from 10 August 2022 speak for themselves on intent. Evidence of a common scheme or plan to do exactly what the videos showed him doing on 10 August 2022 was unnecessary and held little to no probative value.

What probative value it did hold was substantially outweighed by the unfair prejudice resulting from admitting what could have been charged as an attempted violation of Article 120c. Under both Mil. R. Evid. 403 and Mil. R. Evid. 404(b), the value of this evidence simply did not merit the admission of this cumulative and prejudicial material.

The evidence admitted to show SrA Johnson's preparation, intent, and motive similarly returned little probative bang for its prejudicial buck. Nothing about the 4 August 2022 video and pictures or the accumulation of pictures of feet demonstrates anything other than an interest in feet. This evidence provides no leap from that interest to assault. None of the photos or videos of feet involve touching or assaulting the individuals. The 4 August video and pictures show SrA Johnson's interest in filming feet from outside of a room. They in no way indicate SrA Johnson's intent to break into a room with the intent to assault an individual. The lack of similarity to the charged offense under Article 129, UCMJ, gives these items very little probative value. The unfair prejudice resulting from being painted as an individual with an unusual interest in feet substantially outweighs what value was to be gained.

The lack of probative value is made more apparent by SrA Johnson's acquittal on the charged Article 129, UCMJ, burglary offense. Although this acquittal reduces the prejudice to SrA Johnson of the evidence's admission, it does not negate it altogether. The presentation of evidence showing SrA Johnson as someone with a propensity to film individuals and to have an unusual interest in feet applies to the Article 120c, UCMJ, offense, the Article 128, UCMJ, offense, and to the sentence adjudged. The Military Judge applied the legal principles of Mil. R. Evid. 404(b) and Mil. R. Evid. 403 to the facts in a clearly unreasonable manner, thereby abusing his discretion.

Request for Relief

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and sentence.

IV.

THE GUILTY FINDING TO SPECIFICATION 2 OF CHARGE II IS FACTUALLY INSUFFICIENT.

Additional Facts

DF testified that the first thing he felt while asleep in his room at the TLF on 12 August 2022 was pressure on his anus. (R. at 355). He testified that he believed the pressure might have come from a bug. (R. at 355). He stated that he was rather tired, had not been asleep for long, was in a deep sleep, and was in a "groggy state." (R. at 355). DF also took melatonin before going to sleep. (R. at 355). He discounted the feeling and went back to sleep. (R. at 357). He testified that later, he noticed a "rhythm" or massage on his foot around his left toes. (R. at 358). He stated that he was sleeping on his left side when he felt the sensation on his foot. (R. at 358). DF's feet were hanging off the bed, so he initially believed the feeling was from the sheet falling off his foot. (R. at 358). He then felt like the feeling was in a "rhythm" and decided that there was an intruder in his room. (R. at 358). DF then kicked out his right foot, jumped up onto the bed, and turned on the light. (R. at 359). SrA Johnson was lying on the floor on his back at the base of the bed. (R. at 361).

When SrA Johnson's iPhone 13 was later analyzed, several photos of DF's feet taken over approximately forty minutes were found. (Pros. Ex. 13, R. 495-96). The sheet that DF was sleeping under, the comforter at the foot of his bed and DF's underwear were all tested for the presence of SrA Johnson's DNA. (R. at 473). No DNA from SrA Johnson was found on any of these items. (R. at 473).

The Government introduced evidence pursuant to M.R.E. 404(b) demonstrating SrA Johnson's interest in photos of feet. (R. at 457). None of the images or videos depicted anyone touching the feet in the photos. (R. at 462).

Standard of Review

In accordance with Article 66(c), UCMJ, this Court reviews questions of factual sufficiency *de novo*. *United States v. Washington*, 57 M.J 394, 399 (C.A.A.F. 2002).

Law and Argument

For all offenses occurring after January 1, 2021, the law governing a Court of Criminal Appeals' factual sufficiency review is controlled by the updated Article 66(d)(1). Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3611. For these offenses, this Court may affirm only such findings of guilt as the Court finds correct in law and, in fact, in accordance with a new subparagraph (B). Article 66(d)(1)(A), UCMJ (2021). This Court may consider factual sufficiency only in cases where an appellant raises the issue with a specific showing of a deficiency in proof. Article 66(d)(1)(B), UCMJ (2021). After the appellant makes such a showing, the Court may weigh the evidence and determine controverted questions of fact. Article 66(d)(1)(B), UCMJ (2021). The Court's review must give appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence. Article 66(d)(1)(B), UCMJ (2021). If, as a result of this review, the Court is "clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding." Article 66(d)(1)(B), UCMJ (2021).

Before the Court engages in the new factual sufficiency review, an appellant must "identify a weakness in the evidence admitted at trial to support an element . . . and explain why, on balance, the evidence . . . admitted at trial contradicts a guilty finding." *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160 at *17 (A.F. Ct. Crim. App. Apr. 29, 2024) (quoting *United States v. Harvey*, 83 M.J. 685, 691 (N-M. Ct. Crim. App. 2023)). Once a deficiency is identified, the Court considers weighing the evidence admitted at trial and determining controverted questions of fact. Although the new factual sufficiency review requires the Court give appropriate deference to the fact that the trial court saw and heard the

witnesses and other evidence, this Court still has the power to determine the credibility of witnesses. *Csiti*. 2024 CCA LEXIS 160 at *19 (citing *Harvey*, 83 M.J. at 692).

Having then weighed the evidence, this Court must be clearly convinced that the weight of the evidence does not support the conviction before a guilty finding will be set aside. *Csiti*, 2024 CCA LEXIS 160 at *23.

In this case, the guilty finding to Specification 2 of Charge II is factually deficient. Specifically, the evidence admitted at trial does not prove beyond a reasonable doubt that SrA Johnson touched DF's foot with his hand. Rather, this finding is contradicted by the record. Importantly, no physical evidence was admitted to show that SrA Johnson had actually touched DF's foot. None of SrA Johnson's DNA was recovered from DF's foot, let alone his bedding. (R. at 381-82, 473-74). However, expert testimony established that directly touching someone would have transferred DNA. (R. at 470). The only other physical evidence offered by the government was a collection of photos recovered from SrA Johnson's phone that were apparently of DF's feet and taken over the course of approximately 40 minutes. (R. at 495-96). Importantly, not one of those photos showed SrA Johnson touching them.

Given these evidentiary gaps, the Government relied principally on the testimony of DF to prove the specification. However, DF's testimony was unreliable and wrought with serious credibility issues. At the time of the alleged touching, DF was in a deep sleep and "groggy." (R. at 355). DF described first being woken by the sensation of a light touch on his buttocks. (R. at at 359). His initial statement to investigators echoed this version. (R. at 376). DF later exaggerated this story and claimed that SrA Johnson had touched his anus by putting pressure on it, which resulted in pain that lasted for days. (*Id.*) This was in spite of DF's contradictory testimony that he had been wearing underwear, which would have obstructed SrA Johnson from touching him in this manner. (R. at 406).

DF's motivation to change his story was likely driven by a desire to minimize his excessive response to SrA Johnson. DF inflicted severe injuries upon SrA Johnson by striking him in the head five or six times. (R. at 389). When interviewed by OSI, SrA Johnson clarified that these "were not soft punched" while laughing (*Id.*) This occurred while SrA Johnson was locked under DF's legs and offering no resistance. (R. at 363). DF later placed SrA Johnson in a life-threatening "rear naked choke." (R. at 370). DF continued to choke SrA Johnson as the latter protested that he could not breathe. (R. at 372). The choking only ceased once SrA Johnson's body started to convulse. (R. at 395). DF attempted to justify his use of force on the fear that SrA Johnson was going for a stowed weapon. (R. at 369). This is even though DF never observed a weapon on SrA Johnson's person or clothing. (R. at 387-88).

Given these issues of credibility and the lack of evidence, SrA Johnson was found not guilty of sexually assaulting DF. Yet, DF's testimony concerning the alleged foot touching was just as deficient. DF's tendency to exaggerate was subject to the same motivations resulting from his use of excessive force. Likewise, his initial testimony and recollection of the sensation on his foot was merely the sheet falling off as his foot dangled off the edge of the bed. (R. at 358). Given DF's exaggeration of his other claims against SrA Johnson and the lack of physical evidence to corroborate DF's questionable testimony, this Court should be clearly convinced that the weight of the evidence does not support the conviction on this specification.

Request for Relief

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the guilty finding to Specification 2 of Charge II.

V.

WHETHER SENIOR AIRMAN JOHNSON WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

Additional Facts

SrA Johnson was sentenced on 2 May 2023. (R. at XX.) As of 22 August 2023, the ROT had still not been completed. (ROT Vol. 4 – Court Reporter Chronology, Dated 5 October 2023.) This was not docketed with this Court until 14 November 2023. From the date of sentencing until docketing, 196 days elapsed.

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal *de novo*. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law & Analysis

This Court should find that the Government's 196-day delay in docketing SrA Johnson's case with this Court is a due process violation. This delay has interfered with his ability to exercise his appellate rights. Even if this Court finds that SrA Johnson was not prejudiced, this Court should find a due process violation as the delay adversely affects the public's perception of the fairness and integrity of the military justice system. Finally, if this Court does not find a due process violation, it should still grant SrA Johnson relief as the Government acted with gross indifference, there was harm to SrA Johnson, and relief is consistent with the goals of both justice and good order and discipline.

Whether an appellant has been deprived of their due process right to speedy appellate review is determined by balancing the four-factor test outlined in *Barker*. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). The *Barker* factors are: (1) the length of the delay;

(2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Barker*, 407 U.S. at 135. When examining the reason for the delay, this Court determines "how much of the delay was under the Government's control" and "assess[es] any legitimate reasons for the delay." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any Government actors"). Analyzing these factors requires determining which factors favor the Government or the appellant and then balancing these factors. *Id.* No single factor is dispositive, and the absence of a given factor does not prevent this Court from finding a due process violation. *Id.*

A. A 196-Day Delay is Presumptively Unreasonable.

The Government took 196 days from sentencing to docket SrA Johnson's case with this court, which makes the delay presumptively unreasonable. *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, at *131-32 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020) (finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*")). When a case does not meet the 150-day standard, it triggers an analysis of the four non-exclusive factors set forth in *Barker*. *Jackson* 2022 CCA LEXIS 300, at *132. The delay is over two hundred days greater than the 150-day benchmark outlined in *Livak* and more than double what was allowed under the 120-day *Moreno* standard.

B. There is No Justification for the Lengthy Delay.

The record of trial contains no explanation for why this case was subject to such a lengthy delay before docketing with this Court. The time gap between that date and the eventual docketing is without commentary from the government. This Court should use the Government's failure to provide reasons for the delay as a negative presumption against them. If the Government cared about speedy post-trial processing, it would have explained why it

could not meet speedy post-trial processing standards as it did in other cases. *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *5 (A.F. Ct. Crim. App. Nov. 2, 2023). From the silence in the record, this Court should presume the Government did not have any valid reason for the delay. *See Id.* ("We note a troubling period during post-trial processing wherein for 77 days the record sat untouched, in a cubicle at the base legal office. We find no good reasons were provided to justify delay, and accordingly find that this factor weighs in favor of Appellant.").

C. SrA Johnson Asserts His Right to Speedy Post-Trial Processing.

Third, SrA Johnson hereby asserts his right to timely appellate review. Although this factor favors the Government, it is through no fault of SrA Johnson as the undersigned counsel had cases to review before SrA Johnson's case. Additionally, no one factor is dispositive in the *Barker* analysis. *See also Moreno*, 63 M.J. at 138 ("While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.").

D. SrA Johnson suffered prejudice from the Government's Delay.

Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. 63 M.J at 138-39. "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay and [the CAAF] require[s] an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Anderson*, 82 M.J. at 87 (internal quotation marks and citations omitted).

SrA Johnson has faced the "impairment of [his] grounds for appeal." *Moreno*, 63 M.J at 138-39. Because of the 46 days of presumptive, unreasonable delay—196 days in total—

SrA Johnson was unable to petition this Court for relief sooner. Like the appellant in *United States v. Turpiano*, SrA Johnson has been "impeded in his ability to exercise his post-trial rights because of the actions, or more aptly delayed actions, of the Government." No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *19 (A.F. Ct. Crim. App. Sep. 10, 2019) (unpub. op.)

E. Even if this Court finds no *Barker* Prejudice, the Government's Delay Adversely Affects the Public's Perception of the Military Justice System.

Where an appellant does not show prejudice from the delay, there is no due process violation unless "in balancing the three other factors, the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). Assuming, *arguendo*, this Court is unconvinced SrA Johnson was not prejudiced by the Government's 196-day delay, this Court should consider C.A.A.F.'s admonition when deciding if there is a due process violation: "delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court [] is the least defensible of all and worthy of the least patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). The reason this Court should have little patience with the Government is because "this stage involves no discretion or judgment; and, unlike an appellate court's consideration of an appeal, this stage involves no complex legal or factual issues or weighing of policy considerations." *Id*. This Court should find a due process violation because a member of the public could reasonably question the "integrity" of the military justice system in this case. In this case, the military justice system failed to prevent SrA Johnson from being "subjected to inordinate and inexcusable delay after he has been tried." *Dunbar*, 31 M.J. at 70.

Request for Relief

WHEREFORE, SrA Johnson respectfully requests that this court re-assess his sentence.

Conclusion

WHEREFORE, because of errors prejudicial to the appellant's substantial rights, he respectfully requests that the Court set aside and dismiss the findings of guilt to all specifications and Charges.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

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26 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40537
Senior Airman (E-4) JAELEN M. JOHNSON, USAF *Appellant*.	)	Panel No. 2

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	ACM 40537
Senior Airman (E-4) JAELEN M. JOHNSON, USAF *Appellant*.	)	Panel No. 2

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS EVIDENCE UNLAWFULLY OBTAINED FROM APPELLANT'S CELL PHONES?

II.

WHETHER A DELAY OF 195 DAYS BETWEEN THE IMPOSITION OF PRETRIAL RESTRAINT AND ARRAIGNMENT VIOLATED APPELLANT'S ARTICLE 10 AND R.C.M. 707 SPEEDY TRIAL RIGHTS?

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE GOVERNMENT TO ADMIT PICTURES AND VIDEOS UNDER MIL. R. EVID. 404(b)?

IV.

IS THE GUILTY FINDING TO SPECIFICATION 2 OF CHARGE II FACTUALLY SUFFICIENT?

V.

WHETHER [APPELLANT] WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN

THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL?

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

Mr. DF, an Air Force Office of Special Investigations (AFOSI) Special Agent (SA), arrived at Aviano Air Base on 2 August 2022 and began staying at the family Temporary Lodging Facility (TLF) in room 213.[1] (R. at 347.) On the night of 11 August 2020, Mr. DF said he went to bed wearing only underwear because it was hot in the room. (R. at 354.)

At some point during the night, Mr. DF awoke to a pressure on his anus and "some feeling on my right buttocks." (R. at 355.) Mr. DF swiped at the feel thinking it might be a bug but was not really sure since he was groggy. Mr. DF dozed back to sleep. (R. at 357.)

Mr. DF was later again awoken, this time noticing "a rhythm or massage on my foot around my left toes." (R. at 358.) Mr. DF said that due to his height, his feet hung off the bed and, at first, he thought it was the sheet falling off of his foot. However, Mr. DF said, "I noticed that it was a constant rhythm and so, at that point there, I thought that there was an intruder in my room." (Id.) Mr. DF added, "It felt like there was a circular motion. That was, like, massaging on the top of my left foot or near my toes." (Id.) Mr. DF continued, "It felt like it was someone's hand rubbing, more specifically, fingers on top of my foot." (Id.)

Mr. DF said he began to come up with a plan to defend himself since it felt like someone was in the room with him. Since he was laying on his left side, Mr. DF said he slide up his right

[1] To delineate Mr. DF's status in this case as a victim, rather than as an investigator, this brief will refer to him as Mr. DF as opposed to SA DF.

foot as if he was still asleep and then kicked. (R. at 359.) Mr. DF said he felt something soft, like an abdominal area, and jumped up to flip on the light. Mr. DF saw the intruder laying on the ground at the base of his bed. (R. at 361.) The person was wearing a black beanie, a black mask, a black shirt, and underwear, but the intruder's pants were off and lying on the floor.

Feeling targeted and that the intruder was there to harm him, Mr. DF got on top of the intruder and punched him in the face five or six times. (R. at 363.) After the fifth or sixth punch, the intruder said he was not resisting, so Mr. DF stopped punching him. (R. at 364.) Mr. DF told the intruder to get on his stomach and put his hands behind his back. Mr. DF said he still feared for his safety because:

> At that point, there was a man, once he set up with his shoes on, was the same height as me. That also he was rather broad, around the same body weight as me, he was absolutely in control of the situation. He was there to harm me, and I just needed to try to control it too. So, I didn't get hurt.

(Id.) Mr. DF continued, "I was in fear for my life." (R. at 266.) As he was standing the intruder up, Mr. DF noticed a cell phone on the floor that was not his.

Mr. DF asked the intruder if he was American and how he got into Mr. DF's room. (Id.) The intruder said the door was unlocked. The intruder asked Mr. DF not to call security forces, stating, "Let's work this out. Don't call security forces, let's work this out." (Id.)

Holding the intruder's hands behind his back, Mr. DF walked the intruder into the hallway of the TLF building and yelled for someone to call the police. (R. at 368.) However, when Mr. DF went to knock on a neighbor's door, the intruder attempted to run back into Mr. DF's room. Realizing that he had never patted the intruder down, Mr. DF feared the intruder might go for a weapon and began grappling with him. (R. at 369.) Mr. DF "started trying to get

positive control of [the intruder], which eventually ended with me pulling him in a rear naked choke hold." (Id.)

Mr. DF told the intruder to calm down and stop resisting, but the intruder continued moving and "knocking stuff around." (R. at 371.) The intruder was also scratching Mr. DF and attempting to get out of the hold. Mr. DF said the intruder would only stop resisting when Mr. DF applied pressure on the hold. When the intruder said he could not breathe, Mr. DF told him to "stop resisting." (R. at 372.) Eventually, the intruder began convulsing and stopped resisting, which is when Mr. DF immediately released the hold. (Id.)

Mr. DF took the intruder back into the hallway and told him to get into the prone position. When the intruder refused, Mr. DF sat on the intruders back and placed his arm around the intruder's neck, but did not apply pressure. (Id.) Mr. DF said he did this in case the intruder "started to fight me again." (Id.)

From the witness stand, Mr. DF identified Appellant as the intruder. (R. at 387.)

On cross-examination, Mr. DF acknowledged that he told AFOSI that he punched Appellant hard and that, in the moment of talking to AFOSI about the incident, said he was "very uncomfortable" and that he "chuckled" when he told AFOSI that he punched Appellant hard. (R. at 390.) Appellant's counsel responded, "Okay, it's a nervous laugh," before asking, "It's a nervous laugh, but you intended in that moment, to inflict as much harm to that young man, as you could?" (Id.) Mr. DF responded, "What I was trying to do was to control the individual penetrating my room." (Id.) When Appellant's counsel asked, "There was nothing to indicate that, at that point, he is completely compliant," Mr. DF responded, "But he was also in my

room."[2] (R. at 392.) Mr. DF also stated he was "paying attention to the masked man in my room" because "he was the threat." (R. at 402.)

Appellant's defense counsel also asked about Mr. DF's cognitive awareness when he jumped out of bed and turned the light on, which would have been the second time Mr. DF was awoken. (R. at 407.) Mr. DF responded, "I was more cognitively aware in the situation then whenever my anus was initially touched." (Id.) Appellant's counsel then asked, "And it was as much as three seconds from when you felt the foot to when you get out of the bed, correct," to which Mr. DF responded, "Around that time, approximately." (Id.)

A1C RT, a security forces member, responded to the TLF at around 0400 hours. (R. at 412, 428.) A1C RT stated Appellant was dress in all black, but with no shoes or pants on. (R. at 415.) A1C RT said Appellant told her that "the Caucasian male had attacked him in his room" and then asked if he could go into the room to get his phone. (R. at 418.) A1C RT said Appellant was not having any trouble speaking or struggling to breathe. (R. at 422.)

A1C RT then recounted what Mr. DF said about the incident. A1C RT said Mr. DF stated he was sleeping in his bed when he stated something touched his butt, but was not sure if it was the fan or if someone was in his room. (R. at 420.) Mr. DF then told A1C RT that something touched his foot and that is when he realized that someone was in the room with him. (Id.)

AFOSI seized two cell phones that were later searched. (R. at 441, 457.) Over 100 photos were found on one of Appellant's phones that ranged from depictions of feet to depictions of nude buttocks. (R. at 457, 482.) AFOSI SA JA testified that some photos appeared to be

[2] In response to this answer, Appellant's counsel responded, "Yes, he was in your room. That is a fact . . . ." (R. at 392.)

taken at residential facilities "where owners or the person residing in it had a reasonable expectation of privacy," while other photos depicted "individuals in public locations on benches, gyms, things of that nature." (Id.)

SA JA testified specifically about videos filmed on 10 August 2022 (the day before the incident involving Mr. DF) that were found on Appellant's phone. SA JA stated:

> Those videos captured [Appellant] walking into a facility - to the Wyvern Fitness Center, and eventually there was various videos inside the gym and a transition into the locker room and of a shower so to speak, with an individual in the shower, showing a nude buttocks and basically, the person's torso down to the foot area. Mostly focusing in on, halfway, about halfway down the torso to the feet.

(R. at 458.) SA JA said the person taking the videos was Appellant because Appellant's face was visible in the videos.

As to who was being filmed in the video, SA JA stated AFOSI requested logs from the fitness center for that date, compared the time ranges of the logs with the time of the video, and narrowed the list to approximately 20 individuals. (R. at 460-61, 463.) Eventually, after interviews, AFOSI determined SSgt ZP was the person being filmed nude in Appellant's video. (R. at 460-61.)

Prosecution Exhibit 10 contains the videos found on Appellant's phone that were taken on 10 August 2022 at the fitness center. (R. at 486; Pros. Ex. 10.)

Prosecution Exhibit 12 contains photos found on Appellant's phone that were taken on 12 August 2022 from 0308 hours to 0351 hours. (R. at 493-96; Pros. Exs. 12-13.) Based on the timestamps of these photos, as well as a Nintendo Switch that is visible both in these pictures as well as pictures taken by AFOSI of Mr. DF's TLF room after the incident, the photos contained

at Prosecution Exhibit 12 are of Mr. DF's feet while he slept in his bed. (*Compare* Pros. Ex. 1, Pros. Ex. 12.)

SSgt ZP testified that late in 2022, AFOSI contacted him. (R. at 515.) AFOSI asked SSgt ZP if he "would be willing to identify someone" in a photo. (R. at 516.) SSgt ZP ended up identifying himself in the photo. That photo is at Prosecution Exhibit 15. (R. at 518.) At trial, when shown videos from Prosecution Exhibit 10 and asked who was behind the shower curtain, SSgt ZP said, "That would be myself." (R. at 516.) SSgt ZP said he never consented to being recorded naked in the shower. (R. at 518.)

Appellant faced the following charges and specifications at trial:

- *Charge I and its Specification, Article 120, UCMJ*

The specification of Charge I alleged Appellant, on or about 12 August 2022, touched the anus of Mr. DF with his hand with an intent to gratify Appellant's sexual desire without the consent of Mr. DF. Appellant was acquitted of this charge and specification.

- *Charge II, Specification 2, Article 128, UCMJ*[3]

This specification alleged Appellant, on or about 12 August 2022, touched Mr. DF's foot with his hand. The military judge found Appellant guilty of this specification.

- *Charge III and its Specification, Article 129, UCMJ*

This specification alleged Appellant, on or about 12 August 2022, unlawfully broke and entered Mr. DF's TLF rom with the intent to commit an offense under Article 128, UCMJ. Appellant was found not guilty of this specification but guilty of the lesser included offense of unlawful entry.

[3] Charge II, Specification 1 was withdrawn and dismissed.

- *Additional Charge and its Specification, Article 120c, UCMJ*

This specification alleged Appellant, on or about 10 August 2022, made a recording of SSgt ZP's private area with SSgt ZP's consent and under circumstances in which he had a reasonable expectation of privacy. Appellant was convicted of this specification.

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Standard of Review

An appellate court reviews a military judge's ruling on a motion to suppress for abuse of discretion. United States v. Cote, 72 M.J. 41, 44 (C.A.A.F 2013); United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" White, 69 M.J. at 239 (*quoting* United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)). An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002). As a result, the findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. Cote, 72 M.J. at 44.

However, under Mil. R. Evid. 311(d)(2)(A), arguments for suppression of evidence under M.R.E. 311 that are not made at trial are waived. United States v. Perkins, 78 M.J. 381, 389-90

(C.A.A.F. 2019). An "accused must make a 'particularized objection' to the admission of evidence, otherwise the issue is waived and may not be raised on appeal." Id. As Judge Wiss explained in United States v. Stringer, 37 M.J. 120, 125 (C.M.A. 1993), a particularized objection is necessary so that the government has the opportunity to present relevant evidence that might be reviewed on appeal. 37 M.J. at 132 (Wiss, J., concurring in the result).

Additional Facts

- *Motion Testimony*

AFOSI SA AP received a call on 12 August 2022 from another AFOSI special agent detailing an incident that occurred at the TLF at Aviano AB. (R. at 174.) SA AP was told that Mr. DF had been assaulted by Appellant in Mr. DF's TLF room. A cell phone was found near the bed in the TLF room. (R. at 177.) Mr. DF told AFOSI the phone was not his. (Id.) Later testimony showed the phone recovered from Mr. DF's room was an iPhone 13. (R. at 365, 441.)

SA AP understood by this point that Security Forces had detained Appellant nearby and taken into evidence a separate cell phone found on Appellant. (R. at 176-77.) This phone was an iPhone 7. (R. at 496.)

SA AP testified that he sought search authorization for the geolocation data of the cell phone "to place [the] subject at the scene of the incident and the specific time it occurred." (R. at 178.) SA AP said he went to the base theater to meet with Col JF, the approving authority for search authorizations. (R. at 179.) A member of the base legal office joined the conversation via telephone. SA AP said he briefed Col JF "on the circumstances of what we had known so far from that morning, as well as the fact that we had found the phone and were requesting search authorization for geolocation data that was possibly on that phone." (R. at 180.)

Col JF testified and recounted receiving a call from AFOSI requesting search authorization of belongings and items in Appellant's possession at the time of his apprehension. (R. at 149.) With relation to Appellant's cell phone, Col JF said, "The primary request was based on the purpose of looking at the location data within [Appellant's] cell phone." (R. at 150.)

Col JF said he met with AFOSI agents and the base legal office to discuss probable cause and the grounds on which to suspect Appellant was involved in a crime. Col JF said that based on the facts presented to him, he was convinced there was probable cause to search Appellant's cell phone. (Id.) Col JF explained, "[Appellant] was present at the scene. There was a physical altercation that resulted in — that led into the hallway where other individuals were witnessed too and ultimately [Appellant's] phone was found in the victim's room." (Id.)

Col JF gave verbal authorization to search Appellant's cell phone for geolocation data and, a few days later, memorialized the conversation in a written affidavit. (R. at 181.)

AFOSI SA JA, an internal affairs investigator, was assigned to Appellant's investigation because the assault involved a AFOSI SA. Once SA JA was assigned, the first search authorization had already been complete, and SA JA was not involved. (R. at 201.)

SA JA sought an additional search authorization related to Appellant's cell phones. When asked why he requested the expanded search, SA JA first recounted the facts of the evening which included: (1) Mr. DF waking to Appellant in his room; (2) Appellant dropped a phone during the ensuing altercation; (3) Appellant pleaded for Mr. DF not to call the police; (4) once the altercation moved to the hallway, Mr. DF yelled for someone to call law enforcement; (5) Appellant was dressed in all black, including a black beanie, black face mask, and black shirt; (6) Appellant was not wearing pants when law enforcement arrived; (7) law enforcement found

another phone on Appellant when he was apprehended; (8) Appellant's car was parked nearby, but not in the RLF parking lot; and (9) Appellant's keys, wallet and gym bag were in the vehicle. (R. at 202-03.)

SA JA stated that based on these circumstances, it appeared that Appellant "had sanitized himself essentially and all he had was the two phones on him during the alleged assault." (R. at 204.) Because Appellant had left all of his other belongings in his vehicle, SA JA believed there was a strong likelihood that Appellant was using his phones for something. (R. at 207.) SA JA continued, "So that led us to believe that he was either A, communicating with somebody in some manner or may have been taking pictures or videos." (R. at 207-08.)

SA JA also reviewed Appellant's prior history and contacted AFOSI at Kadena AB and Incirlik AB. Incirlik AFOSI stated that on 29 December 2021, an incident occurred where two separate individuals reported seeing an individual matching Appellant's physical description and wearing all black. (R. at 206.) One individual reported waking and seeing a tall black male dressed in all black crawling in his bedroom. When confronted, the individual made a comment to the effect of "please don't call law enforcement." (Id.) Shortly after that, a female saw someone matching the same description in the dormitories, and she said something to him. The individual ran into a bathroom, locked himself in there, and stayed there for a few minutes before departing the scene. (Id.)

Considering the behavior, dress and physical description, as well as Appellant being assigned to Incirlik at the time, SA JA felt that was a probability that there was a series of behavior or repeat behavior. (R. at 206.) SA JA also suspected, based on Appellant's similar behavior on 12 August 2022, namely having only his phone on him and being dressed the same,

that Appellant's phones may have evidence of not only the incident at Aviano on 12 August 2022, but of potential incidents at Incirlik. (R. at 208.)

Based on this information, SA JA believed there was probable cause to expand the search authority to means of communication (text messages, instant messages, etc.) and media, such as photos and videos. (R. at 208-09.) After consultation with the legal office, SA JA contacted Col JF and requested the added search authorization of the cell phones for media ranging from 29 December 2021 (the date of the Incirlik incident) to 12 August 2022 (the date of the Aviano incident). (R. at 209.)

After the first authorization, Col JF said there was an additional request to search the cell phones for media, including photos, videos and messages. (R. at 151.) Col JF said, "That request was centered on the fact that there were multiple phones found on the location and there was reason to believe that those phones were actually used during the alleged crime." (Id.) Col JF said the "fact that there was more than one phone led me to believe that those phones had a – there was a purpose for those phones beyond simply a communication device." (R. at 164.) Because Appellant had two phones with him at the victim's room, i.e. the crime scene, Col JF believed "that there was probable cause that they were involved in the crime itself." (R. at 165.)

Col JF also had conversations with AFOSI about similar incidents that occurred at Appellant's prior duty station. Col JF said, "There was allegations of very similar behavior at a previous location. Very similar complaints and very similar methods, which convinced us there was probable cause to look into the phones for any capturing of media, pictures, videos, anything of that sort." (R. at 152.) Col JF continued, "So the discussion was centered on the fact that there were possible pictures taken of individuals while they were sleeping. Unauthorized entry into residences and the pattern of behavior that was presented seemed very similar to allegations

from a previous base." (R. at 154.) Col JF granted the additional search authorization on 31 August 2022. (R. at 215.)

Though both cell phones had already been sent for analysis, data from one iPhone, the iPhone 13, was not transferred until 6 September 2022, and analysis did not begin until 7 September 2022. (R. at 224-25.)

SA JB is an AFOSI digital forensics consultant who analyzed the phones. SA JB stated that when he began analyzing the iPhone 13, he had two search authorizations, one for location data and one for media and communications. (R. at 226.) SA JB said he found "a significant amount of pictures of what appeared to be feet around the same time as the [12 August] incident." (R. at 227.) SA JB said numerous photos of feet were taken in areas where someone might expect privacy, such as a locker room, lodging room, or when they were sleeping. (R. at 229.)

As to the other phone, an iPhone 7, SA JB said the phone was in a different locked state which involved "different type of security parameters." (R. at 227.) This required "brute force of the device which meant we had to try essentially every singly type of passcode that could exist for that device, which was a 6-digit passcode." (R. at 228.)

- *Military Judge's Ruling*

The military judge denied Appellant's suppression motion in a 28-page ruling. (App. Ex. XX.) In his findings, the military judge first stated that the "Defense appears to concede Col [JF] was a 'competent military authority,'" and the military judge agreed. (Id. at 21.) The military judge noted that Col JF signed the affidavits and AF 1176s in this case, was the 31st Medical Group commander, and Appellant was a member of a subordinate squadron within that group.

The judge held, "Therefore, Col [JF] had control over the person (and that person's property) to be searched." (Id.)

Next, the judge turned to the first search authorization. The military judge noted that Col JF met with SA AP and another AFOSI SA in person with a judge advocate on the phone. During that meeting, the military judge determined SA AP discussed the facts of the case as detailed above and explained that geolocation data could place Appellant at the scene of the crime. (Id. at 22.) The military judge noted that this conversation only dealt with one of the phones in play that night.

The military judge then discussed how SA AP followed up with Col JF later with an affidavit and AF 1176. The judge stated, "This step was to reduce to writing the authorization previously granted, but it also, in effect, expanded the verbal authorization because the written documents included both of [Appellant's] phones." (Id.) The judge held, "the court finds Col [JF] considered both the sworn facts presented to him during the in-person meeting, and in the sworn affidavit provided by SA [AP] later before granting the two search authorizations," adding that the fact that the written request expanded the verbal authorization to include both phones did not matter because neither phone had been searched before the written authorization was signed. (Id.)

In providing "substantial deference" to Col JF's probable cause determination, the military judge held Col JF had a "reasonable belief that the phones would reveal location data that placed [Appellant] at the TLF on 12 August 2022." (Id. at 23.) The judge noted that, based on the evidence, "it is clear [Appellant] had one phone in his possession, and left another one at the crime scene," adding, "Given both phones were capable of storing location data, Col [JF] could reasonably have believed the phones would have such data recorded on them and that the

data could show [Appellant] was at the TLF as reported by [Mr.] DF." (Id.) The military judge further held, "this court does not find this to be a close call." (Id.)

As to the second search authorization, the military judge stated SA JA's affidavit recapped previously provided information as well as additional information, including: (1) Appellant's car was parked at the base CDC, not Mr. DF's TLF building; (2) the car was found unlocked and Appellant's keys, wallet, and gym bag (filled with civilian clothes) were inside; and (3) Appellant was found on 12 August 2022 wearing all black clothing, with no pants or shoes, and only had a cell phone on his person. (Id. at 24.) SA JA's affidavit also summarized his education, training and experience, as well as SA JA's belief that Appellant used his cell phones during the commission of the alleged crimes against Mr. DR and that SA JA presented all of this information to a judge advocate who agreed "with [SA JA's] probable cause determination and request to expand the original search of [Appellant's] phones to include now, among other things, 'media produced between 29 December 2021 and 12 August 2022." (Id.)

The military judge noted the Defense's attack on the fact that the affidavit did not explain the date range. However, the military judge held, "This ignores the in-person meeting that also took place between SA [JA], JA and Col [JF]," adding that in this meeting Col JF was informed of the similar incident at Incirlik AB.

The judge also noted Appellant's reliance on an Army Court of Criminal Appeals case, United States v. Morales, 77 M.J. 567 (A. Ct. Crim. App. 2017), which held that the nature of sexual assault is not such that photographic documentation of the crime would be found on a cell phone, in arguing that Col JF could not have reasonably believed evidence of the crimes being investigated would be found on Appellant's phones. (Id. at 25.) The military judge stated the court was "somewhat persuaded by this argument making this one a closer call than the first

search authorization." The military judge agreed that the facts of the 12 August 2022 incident and the Incirlik incident did not provide facts sufficient to "go rummaging about in [Appellant's] cell phones." (Id.) However, the military judge continued, "What saves this evidence for the Government here is the facts about the car, its contents, and the fact [Appellant] was carrying two phones – which Col [JF] found particularly compelling." (Id.)

The military judge then listed facts supporting this conclusion:

- Appellant parked his car in a different parking lot
- Appellant left behind his wallet and car keys in his car
- Appellant deliberately took two cell phones with him

(Id.) The military judge stated that if these facts were taken away, the court may have applied Nieto or Morales and invalidated Col JF's probable cause determination. However, the military judge held these facts created a nexus between Appellant's crimes and the phones.

Further, the military judge found Col JF's determination did not simply ratify a bare conclusion from SA JA, but instead was fairly supported by the facts, SA JA's training and experience, as well as a judge advocate's concurrence. While the military judge did call this a "closer call" than the first search authorization, the judge held, "the court finds Col [JF] could reasonably have found a substantial nexus, and thus, the court will grant Col [JF] the substantial deference owed him under the law." (Id.)

Even though the military judge upheld Col JF's probable cause determination, he also analyzed and found a good faith exception in this case. (Id. at 26.) The military judge found "no evidence that SA [AP] or SA [JA] intentionally or recklessly provided false information to Col [JF]" or provided "bare bones" conclusions. (Id. at 27.) Instead, "the agents provided sufficient facts that put meat on the bones of their conclusions," adding that these facts "persuaded JA and Col [JF] that probable caused existed." The military judge held, "Based on the facts in this case,

the court also finds a reasonable law enforcement would have an objectively reasonable belief that Col [JF] had a 'substantial basis' for determining the existence of probable cause." (Id.)

The military judge also found "no evidence Col [JF] wholly abandoned his judicial role and merely acted as a rubber stamp for OSI," adding that Col JF was trained on conducting search authorizations, that evidence provided to Col JF both verbally and in writing was sworn, that both search authorizations were reduced to writing and had been subjected to judicial scrutiny, and that, while the affidavits did have typographical errors, any defects were more form over substance. The military judge held that sufficient information was presented to Col JF and that "each time before agents sought search authorization from Col [JF], they sought advice and concurrence from JA." Thus, the military judge held "the Defense motion must fail as the good faith basis exception applies in this case." (Id.)

Finally, pursuant to Mil. R. Evid. 311(a)(3) and United States v. Lattin, 83 M.J. 192 (C.A.A.F. 2023), the military judge did not believe "the exclusion of the evidence here would result in appreciable deterrence of future unlawful searches and any such deterrence does not outweigh the costs to the justice system of excluding the evidence." (App. Ex. XX at 27.) The military judge found no unreasonable or unlawful overreach on the part of AFOSI or Col JF and that their "judgments were based on the facts developed and presented." (Id.) The judge continued, "it is hard to find any fault in the investigators' or Col [JF's] approaches or decisions in this case." (Id. at 28.)

Law

Mil. R. Evid. 315(f)(2) defines probable cause as "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Within these parameters, "the duty of a reviewing court is simply to ensure that the magistrate had a

'substantial basis for . . . [concluding]' that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (alterations in original) (*quoting* Jones v. United States, 362 U.S. 257, 271 (1960)). Our superior court has applied four key principles in reviewing probable cause determinations under M.R.E. 315: (1) we view the facts in the light most favorable to the prevailing party; (2) we give substantial deference to the probable cause determination made by a neutral and detached magistrate; (3) we resolve close cases in favor of the magistrate's decision; and (4) we view the facts in a commonsense manner. United States v. Huntzinger, 69 M.J. 1, 7 (C.A.A.F. 2010) (*citing* United States v. Macomber, 67 M.J. 214, 218 (C.A.A.F. 2009)).

Additionally, the Supreme Court has found that "[r]easonable minds frequently may differ on the question [of] whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination." United States v. Leon, 468 U.S. 897, 914 (1984) (internal quotation marks omitted) (citations omitted); *see also* Gates, 462 U.S. at 236 ("magistrate's determination of probable cause should be paid great deference by reviewing courts.'" (*quoting* Spinelli v. United States, 393 U.S. 410, 419 (1969))). Consistent with this precedent, our superior court has held that "determinations of probable cause made by a neutral and detached magistrate are entitled to substantial deference." United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010); *see also* United States v. Hoffman, 75 M.J. 120, 123 (C.A.A.F. 2016) ("Searches conducted after obtaining a warrant or authorization based on probable cause are presumptively reasonable.").

A nexus inquiry "focuses on whether there was a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Nieto, 76 M.J. 101, 106 (C.A.A.F. 2017) (internal quotation marks and citation omitted). "A nexus may be inferred from

the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept." Id. (internal quotation marks and citation omitted).

Under the good-faith exception, evidence obtained as a result of an unlawful search will not be excluded if the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Mil. R. Evid. 311(b)(3)(C). Under this exception, evidence obtained as a result of an otherwise unlawful search or seizure may be used if:

> (A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) . . . ;
>
> (B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

Mil. R. Evid. 311(c)(3). With respect to subsection (A), our superior court has held this condition is satisfied "if the officers executing the warrant reasonably believe that the magistrate has authority over the place searched." United States v. Chapple, 36 M.J. 410, 414 (C.M.A. 1993).

In Leon, 468 U.S. at 914-15, the Supreme Court determined that there were four circumstances under which the good faith exception does not apply: (1) a false or reckless affidavit; (2) a "rubber stamp" judicial review; (3) an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) a facially

deficient warrant. In United States v. Carter, 54 M.J. 414, 421-22 (C.A.A.F. 2001), our superior court stated that the President, in promulgating Mil. R. Evid. 311 (c)(3)(B), was seeking to codify the good faith exception in Leon.

Analysis

- *Appellant waived any argument related to the authority of the commandeer under Mil. R. Evid. 315(d)(1)*

At trial, Appellant moved to suppress evidence from Appellant's cell phones pursuant to Mil. R. Evid. 311. (App. Ex. XVII.) However, Appellant never argued, as he does now for the first time before this Court, that Col JF "did not have authority to issue either search authorization in this case" because he did not have control over the place where the property to be searched was situated. (*See* App. Br. at 12.)

As the military judge correctly highlighted in his ruling, the only time the subject was broached by Appellant in his motion was when Appellant stated, "Although the search and seizure may have been authorized by an individual competent to issue the search authorization . . . ." (Id. at 16.) Notably, the four subheadings of Appellant's *Argument* section of his motion are "No Probable Cause Existed to Authorize the Search of [Appellant's] Phone Outside the Location Data," "The Good Faith Exception is Not Applicable in this Case," "Inevitable Discovery," and "Exclusion of the Evidence is Appropriate in this Case." (Id. at 16-17.)

Further, though Col JF testified at the motions hearing, neither Appellant nor his counsel ever raised the issue of whether Col JF had the authority to issue the search authorization either through the questioning of Col JF or through Appellant defense counsel's argument on the motion. (*See* R. at 147-171, 256-294.) In fact, based on Appellant's lack of concern for the

issue, the military judge correctly stated in his ruling that the "Defense appears to concede Col [JF] was a 'competent military authority.'" (App. Ex. XX at 21.)

Moreover, Appellant in his own brief to this Court seemingly concedes that he did not raise this issue at trial when he employs the "plain error" standard for this portion of his argument, which connotates an admission that Appellant failed to raise the issue at trial. (App. Br. at 9, 12.) However, where Appellant cites to R.C.M. 905(e)(2) to argue that this issue was merely forfeited vice being waived, Appellant fails to note Mil. R. Evid. 311(d)(2)(A), or our superior court's precedent, which states that arguments for suppression of evidence under M.R.E. 311 that are not made at trial are waived. *See* Perkins, 78 M.J. at 389-90. Here, Appellant was required to make a "particularized objection" that Col JF did not have the authority to issue the search authorizations. *See* Stringer, 37 M.J. at 125, 132. Despite having ample opportunity to do so, Appellant make no such "particularized objection."

Here, Appellant makes his argument that Col JF did not have the authority to issue the search authorizations for the first time on appeal to this Court. Following our superior court's lead in Perkins, this Court should consider this argument waived. As this Court no longer has the ability to pierce waiver, this Court should decline review of Appellant's argument. *See* United States v. George, ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. 7 June 2024).

However, even if this Court does not consider the argument waived, the Court can employ the good-faith exception to quickly dispatch Appellant's arguments. In Chapple, an overseas installation commander issued a commander authorization for search and seizure for an off-base apartment leased in Italy by a Sailor whose unit was not under the installation commander's command. Our superior court found that because neither the off-base apartment nor the Sailor was under his control, the installation commander lacked authority to issue the

authorization. However, because the installation commander was generally empowered to authorize searches, and because he, his staff judge advocate, the investigating agents, and the military judge all erroneously believed the commander had authority to authorize the search in question, the court found that condition (A) was met and applied the good faith exception. Id.

Here, just as in the Chapple, Col JF was generally empowered to authorize searches, particularly with respect to members under his command. Further, Col JF, multiple judge advocates, multiple investigating agents, and the military judge all believed Col JF had the authority to authorize the search. Moreover, Appellant's own trial defense counsel appeared to believe this as well since the defense did not raise this issue at trial.

However, Appellant claims that SA AP "definitely knew that Col JF had no authority to issue a search authorization . . . because he applied for a search authorization for that phone along with the rest of the contents of the TLF room on a separate search authorization not presented to Col JF." (App. Br. at 14.) But Appellant fails to recognize that SA AP's search affidavit, which was reviewed by a judge advocate, specifically requested search authorization from Col JF for, among other things, "a search and seizure of VICTIM's room." (App. Ex. XV at 50.) The affidavit then specifically stated, "Places to be searched are SUBJECT's Person and VICTIM's residence, Rm 213, Bldg 1483, AAB, IT," which was Mr. DF's TLF room. SA AP's search affidavit clearly shows SA AP, as well as the judge advocate who reviewed it, believed Col JF had authority to issue a search authorization for the Mr. DF's TLF room.

Moreover, in making his claim, Appellant cites to the record at 191 and 193 for the contention that SA AP drafted multiple search authorizations but only presented one to Col JF, while presenting others to a separate search authority. However, the record does not support Appellant's contention. While the record does show SA AP drafted multiple search

authorizations (AF 1176s), there is no indication that SA AP went to anyone other than Col JF to obtain search authorization, especially considering SA AP's affidavit, which accompanied the AF 1176s, requested Col JF's authorization to search items found on Appellant as well as Mr. DF's TLF room. (See R. at 191-93; see also App. Ex. XV at 50.) If anything, the record is unclear on this point. However, had Appellant actually raised this issue at trial, this factual question could have easily been answered and highlights while this Court should view this argument waived due to Appellant's failure to raise the issue at that time.

Next, Appellant claims that when SA JA was assigned to the case, he "had access to the previous search authorizations" and would have known Col JF did not possess authority, adding that "[a]ny belief that SA JA held that Col JF could now authorize the search of the iPhone 13 when he could not when SA AP was working the case was unreasonable." (App. Br. at 14.) Again though, Appellant's argument is based on a false premise –that SA AP thought Col JF did not have the authority to authorize the search. Yet, SA AP's search affidavit plainly shows SA AP believed Col JF *did* have the authority to approve a search of Mr. DF's room – otherwise that language would not have been included in SA AP's affidavit. Here, Appellant fails to explain why or how SA JA would have known Col JF did not possess this authority, especially considering SA AP's affidavit specifically requested Col JF authorize a search of the TLF room and both of Appellant's cell phones.

To this point, any uncertainty as to whether Col JF, SA AP, or SA JA, or the advising judge advocates reasonably believed that Col JF had authority over the place searched could have easily been cleared up at trial if Appellant had simply asked Col JF, SA AP, or SA JA this question when each testified at the motion hearing. However, those questions were never asked – all of which is Appellant's fault since Appellant never raised this issue at trial. This is even

more reason why this Court should view Appellant's argument here as waived. To Judge Wiss's point, a particularized objection to Col JF's authority was necessary here so that the government had the opportunity to present relevant evidence that might be reviewed on appeal, including the reasonable beliefs of Col JF, SA AP and SA JA that Col JF possessed authority to issue the search authorization. *See* Stringer. 37 M.J. at 132 (Wiss, J., concurring in the result).

In sum, Appellant waived this issue by not raising this "particularized objection" at trial. Even still, assuming the issue was not waived and assuming Col JF did not have the authority to authorize the search, the evidence abundantly shows all involved, including Col JF, SA AP, SA JA, and multiple judge advocates, reasonably believed Col JF possessed the authority to authorize the search. As a result, Appellant's argument must fail.

- *The military judge did not abuse his discretion in denying Appellant's motion*
    - *Probable Cause*

Here, Appellant seemingly abandons his argument at trial that Col JF did not have probable cause at all to search Appellant's cell phones or that Col JF did not have probable cause to search Appellant's phone for geolocation data. Instead, Appellant now only argues that the military judge abused his discretion in finding that Col JF had probable cause to search "Appellant's cell phones for evidence that predated 12 August 2022." (App. Br. at 15.) Appellant is again mistaken.

- *Evidence that Predated 12 August 2022*

Appellant claims the military judge "did not discuss how these facts created a nexus between the 29 December report in Incerlik [sic] and [Appellant's] cell phones." (App. Br. at 17.) Appellant is again incorrect as the military judge, within his ruling, discussed the Defense's attack on the fact that the affidavit did not explain the date range before stating, "This ignores the

in-person meeting that also took place between SA [JA], JA and Col [JF]," adding that in this meeting Col JF was informed of the similar incident at Incirlik AB. (App. Ex. XX at 24.) Appellant's claim here that the military judge "did not address the date range in his ruling" is wrong.

Further, there was a nexus between the TLF incident at Aviano and the Incirlik incident as both involved: (1) a tall black male; (2) dressed in all black; (3) crawling in another person's bedroom; (4) roaming around dormitories; (4) the perpetrator stating "please don't call law enforcement" when confronted; and (5) Appellant being assigned to that installation at the time. Considering this behavior, which matched exactly Appellant's dress, physical description, behavior, and activities on 12 August 2022, AFOSI believed there was a probability that there was a "series of behavior or repeated behavior," which gave rise to the expanded timeframe of not just 12 August 2022 and 29 December 2021, but of the timeframe in between as well. (R. at 206.) All of this information was later passed along to Col JF prior to the second search authorization.

The combination of the five factors listed above shows the probable cause standard in tying Appellant to the Incirlik incident was met. As the Supreme Court noted in Gates, "Probable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act[.]'" Gates, 462 U.S. at 241. Indeed, our superior Court has stated:

> It is not a technical standard, but rather is based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. Thus, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than

> false, there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present. The duty of the reviewing court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.

United States v. Leedy, 65 M.J. 208, 212 (C.A.A.F. 2007).

Here, two individuals in Incirlik reported seeing a tall black male. Appellant is a tall black male. Next, the Incirlik suspect wore all black. Appellant, during the 12 August 2022 incident, wore all black. Next, the suspect in Incirlik was roaming around dormitories, i.e., lodging facilities. Appellant, at Aviano, was found at the TLF, a lodging facility. Next, when confronted in Incirlik, the perpetrator begged to not have law enforcement called. Appellant, in Mr. DF's Aviano TLF room, begged Mr. DF to not call law enforcement. Finally, Appellant was assigned to Incirlik at the time of the December 2021 incident.

Considering the exact match between the Incirlik incident and the Aviano incident, including Appellant's dress, physical description, behavior, and activities that occurred on 12 August 2022, Col JF was perfectly justified in having "more than a bare suspicion" that Appellant was the Incirlik perpetrator. Further considering the exact matches in dress, physical description, behavior, and activities between the two incidents, Col JF was also justified in having "more than a bare suspicion" that Appellant used his phone in the commission of his acts in Incirlik just as he had done in Aviano. As held by CAAF, the standard is "something less than a preponderance of evidence" and does not even require a "more likely true than false" determination. Instead, in this case, considering the exact matches between the two incidents, evidence presented to Col JF showed a "fair probability" that Appellant was not only the Incirlik perpetrator, but that he used his cell phone during that incident as well. These circumstances

also showed there was a "fair probability" that these incidents were part of a "series of behavior or repeated behavior," which gave rise to the expanded timeframe of not just 12 August 2022 and 29 December 2021, but of the timeframe in between as well.

- *Nexus Between the 12 August 2022 Offense and Appellant's Cell Phones*

Appellant also claims there was no nexus between the 12 August 2022 offenses and his two cell phones. Appellant claims Col JF "had nothing more than intuitive guesswork" that "individuals carrying out a crime while possessing a cell phone must have used the phone in a criminal manner." (App. Br. at 16.) In doing so, Appellant attempts to compare his case to two others - United States v. Hoffman, 75 M.J. 120, 127 (C.A.A.F. 2016) and United States v. Toledo, No. ACM 39232, 2018 CCA LEXIS 497 (A.F. Ct. Crim. App. Oct. 16, 2018). Neither is comparable.

In Hoffman, our superior court considered whether evidence of acts of child enticement and "an intuitive relationship between [such acts] and the possession of child pornography" could provide a substantial basis for concluding that there was probable cause to believe the appellant possessed child pornography on his electronic media. Hoffman, 75 M.J. at 127. Noting an absence of *any* evidence or direct link connecting the acts of child enticement to the possession of child pornography on the electronic media seized, CAAF found the facts before the search authority insufficient to provide a substantial basis for probable cause to believe the appellant possessed child pornography on his electronic media. Id.

Here, however, Col JF did not rely on an "intuitive relationship" between different crimes or anything else. Instead, as the military judge held, key indicators showed a high likelihood that Appellant used his phones during the commission of his crimes, including parking his car at a

separate parking lot than the TLF and then, while dressed in all black, leaving his keys, wallet, and gym bag (filled with civilian clothes) inside the vehicle and, instead, deliberately taking only his *two* cell phones. Here, Appellant deliberate decision to take not one, but two cell phones, while also leaving all of his other personal belongings in his car provided a strong implication that Appellant planned to use these two cell phones as part of the commission of his crimes. Otherwise, Appellant would have left those items in his vehicle along with all the rest of his personal belongings. Finally, while one of the cell phones was found on Appellant once he was apprehended, the other cell phone was found on the floor of the crime scene. And if Appellant planned to use the cell phones in the commission of his crimes, logic supports a reasonable belief that evidence of the crime would be found on one or both of the phones. This provided the necessary nexus between Appellant's crimes and the phones.

In Toledo, an appellant showed up to a meeting with who he thought was an underage girl ("Riley") with a video camera with the stated intent to video tape sex acts with the underage girl. This Court found a subsequent search of the video camera invalid because "there was no direct factual link between Appellant's interactions with 'Riley' and any data stored on Appellant's camera or camera memory card." Toledo, at *15. Notably, this Court highlighted that at the time of the warrant's issuance, there was little reason to believe that the camera contained evidence of the offense for which the appellant was apprehended - the enticement of "Riley" – because the appellant had not yet completed the meet-up with "Riley," and had not had any opportunity to film any interaction between himself and "Riley." Id. at *16.

Here, in contrast to Toledo, Appellant had completed his crimes against Mr. DF when law enforcement arrived and, thus, had an opportunity to use his phones in the commission of his crimes. Significantly, one of the phones was found at the crime scene – that being Mr. DF's

room. Here, as SA JA testified, Appellant left all of his personal belongings in his vehicle except for two things – both of which were cell phones. Considering his action of, as SA JA put it, "sanitizing" himself by leaving every other personal belonging in his car besides these phones, Appellant created the strong implication that he was going to use those phones in the commission of his crimes. Otherwise, Appellant would have simply left those phones in his car just like he left his keys, his wallet, and his civilian clothes.

Considering Appellant's actions of only bringing his two cell phones to Mr. DF's room (and nothing else) along with the fact that Appellant had completed his crimes once the cell phones were seized and one of the cell phones was found lying on the floor of the crime scene, Col JF had a "direct factual link" between Appellant's crimes and the cell phones. Again, whereas in Toledo, nothing had occurred that could have possibly involved the video camera (since Appellant had not yet interacted with "Riley"), Appellant here had completed his crimes, interacted with Mr. DF, and left one of his cell phones in Mr. DF's room by the time his cell phones were seized by authorities. Thus, Appellant's case and Toledo are not comparable. Here, while SA JA's training, knowledge, and expertise played a part of Col JF's equation in terms of deciding probable cause, Col JF also had facts and circumstances beyond mere "intuition" that Appellant used his two cell phones in the commission of his crimes.

Appellant also attempts to compare his case to Nieto. (App. Br. at 17.) Again, that case is distinguishable. That case involved an appellant who had been caught surreptitiously recording other soldiers in the restroom with his cell phone. Our superior Court found insufficient probable cause to search the appellant's laptop, even though the investigator offered the magistrate a generalized profile about how servicemembers often transfer images from their phones to their laptops. Id. at 107. Thus, there was no connection between that appellant's cell

phone and laptop besides a generalized profile. Here, however, Appellant's cell phones were found at the scene of the crime against DF, and Appellant made deliberate actions to take only his two cell phones with him as he perpetrated his crimes. Thus, as opposed to Nieto that only had a generalized profile with no connecting nexus, Col JF had evidence of a direct nexus between Appellant's crimes and his phones.

Importantly, Nieto did not hold that profile evidence can never be used in establishing a nexus to the place to be searched. Instead, in that case, CAAF explained that the investigator's profile was technologically outdated because the cell phone being used by the appellant could store thousands of pictures and hundreds of videos, which would obviate the need for the appellant to transfer any images to a laptop. Id. at 107. Our superior Court has said that profiles can be used to support probable cause, so long as there is a specific nexus between the profile and the person concerned. Macomber, 67 M.J. at 22. Citing to Macomber, our superior Court stated that a generalized profile about how people normally act in certain circumstances must be accompanied by some additional showing that the accused fit that profile or that the accused engaged in such conduct. Nieto, 76 M.J. at 106.

Here, SA JA did not use any outdated technology profile in forming his belief that Appellant used his cell phones in the commission of his crime. In fact, SA JA did not really use a profile at all, but simply connected the dots of Appellant's actions throughout the night. Here, Appellant made a deliberate decision to leave all of his personal belongings in his car – his keys, his wallet, and civilian clothes – but made the deliberate decision to take two cell phones with him. Here, using his training and experience as an investigator, SA JA deducted Appellant did this for a reason - which was to use those items in the commission of his crimes. Otherwise, as noted above, Appellant would have left those phones in his car along with his keys and wallet.

Another crucial factor here is that Appellant took not one, but two cell phones with him that night, which is also abnormal and a commonsense indicator that Appellant needed those two phones for a reason. Finally, all of these actions occurred in the dead of night as Appellant left his car and headed to a lodging facility where he was not staying.

Here, if any generalized profile was used by SA JA, it was simply that people, in the middle of the night, do not normally park their car in a separate parking lot from where they are ultimately going, dress in all black, leave all of their personal belongings in their car except for two cell phones, and then leave one of those cell phones in a room that the person unlawfully entered. These actions are not normal and provide a clear indication that the cell phones in this scenario play a significant role. Tying this "profile" to this case, SA JA explained to Col JF that Appellant engaged in each of these actions on the night in question. Considering these factors, SA JA believed that Appellant's own actions indicated a high likelihood that Appellant used his cell phones in the commission of his crimes. To the extent that SA JA used a "generalized profile about how people normally act in certain circumstances," SA JA accompanied that profile with abundant evidence that Appellant fit that profile that Appellant engaged in that conduct. *See* Nieto, 76 M.J. at 106.

Here, when viewing Col JF's probable cause determination in the light most favorable to the Government, giving substantial deference to Col JF's determination, and CAAF's direction to resolve close cases in favor of a search authority's decision, as well as viewing the facts in a commonsense manner, this Court should find no abuse of discretion by the military judge in

determining Col JF had probable cause to grant the search authorization. *See* Huntzinger, 69 M.J. at 7.[4]

- *Good Faith Exception*

The military judge also did not err in determining the good faith exception applied in this case even if Col JF did not have probable cause. Appellant disputes this, but only reiterates earlier arguments. (App. Br. at 19.) For instance, Appellant claims Col JF "had only a cursory idea" of the Incirlik incident and that there is an "omission of why [SA JA] sought to search an eight-month period instead of a 24-hour one." (Id.) Again, however, the military judge discussed in his ruling that SA JA discussed the Incirlik incident with Col JF, including how that incident matched exactly Appellant's dress, physical description, behavior, and activities on 12 August 2022. Further, SA JA's testimony details exactly why AFOSI wished to search Appellant's phone for the eight-month period, namely SA JA's belief that there was a probability of "series of behavior or repeated behavior" during this timeframe. (R. at 206.) Notably, SA JA discussed this belief with a judge advocate who agreed there was probable cause to search the phones. (R. at 209.)

Here, the military judge properly identified factors that showed SA JA had an objectively reasonable belief that Col JF had a substantial basis for determining the existence of probable cause. Further, in seeking authorization to search, SA JA discussed the case with other AFOSI SAs and the base legal office. Further, there is no evidence that SA JA either intentionally or recklessly misled Col JF. *See* Davis v. United States, 564 U.S. 229, 238 (2011) (noting that

[4] Appellant's brief does not address the four principles CAAF uses to review probable cause determinations or acknowledge that this Court gives "substantial deference" to a probable cause determination.

exclusion of evidence is inappropriate "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence" (internal quotation marks and citations omitted)).

Additionally, as the military judge held, Col FJ did not "wholly abandon[] his judicial role and merely acted as a rubber stamp for OSI." (App. Ex. XX at 25.) Instead, evidence showed Col JF was trained on conducting search authorizations, that evidence provided to Col JF both verbally and in writing was sworn, and that both search authorizations were reduced to writing and were subjected to judicial scrutiny.

Finally, the evidence shows AFOSI "reasonably and with good faith relied on the issuance of the authorization." Mil. R. Evid. 311(c)(3)(C). SA JA's affidavit and discussions with Col JF were "more than a 'bare bones' recital of conclusions." *See* Carter, 54 M.J. at 421. Neither were they not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (internal quotation marks and citation omitted).

Overall, Col JF's authorization was not "so facially deficient" that the executing officers could not "reasonably presume it to be valid." Id. (citation omitted); *see also* Perkins, 78 M.J. at 389 ("[T]he search authorization was not facially defective because it identified the place to search . . . and described in detail what to look for."). Furthermore, the good-faith exception recognizes that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 918-19. For these reasons, the good faith exception applies int his case and the military judge did not abuse his discretion in making this finding.

- *The military judge correctly determined that the deterrent value of suppressing the evidence did not outweigh the costs to the justice system.*

For the exclusionary rule to apply, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." Lattin, 83 M.J. at 197. When reviewing a military judge's decision whether to apply the exclusionary rule under Mil. R. Evid. 311(a)(3), the court asks "whether the military judge's assessment of these matters was a 'clearly unreasonable' exercise of discretion." Id. at 198.

Here, the military judge did not commit a "clearly unreasonable" exercise of discretion in deciding that Mil. R. Evid 311(a)(3) did not support exclusion because the deterrent value of suppression did not outweigh the costs to the justice system. As the military judge held, there was no unlawful or unreasonable overreach on the part of either AFOSI, the legal office, or Col JF. In other words, law enforcement's behavior in this case reinforced that the search and seizure of Appellant's cell phones was done in good faith. Further, SA JA thoroughly investigated the case into Appellant and consulted colleagues and judge advocates before seeking a search authorization. Moreover, SA JA took the step of seeking a search authorization, which is prima facie evidence of good faith. United States v. Koerth, 312 F.3d 862, 868 (7th Cir. 2002). Further, SA JA discussed the case with Col JF and provided an affidavit to Col JF to support his search authorization request.

In short, the agents did exactly as one would hope and expect of them in this case. As the military judge put it, "it is hard to find any fault in the investigators' or Col [JF's] approaches or decisions in this case." (App. Ex. XX at 28.). This was certainly not the sort of "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" that triggers suppression. *See* Davis, 564 U.S. at 238.

Further, suppressing a video filmed by Appellant of a fellow military member showering in the base gym would be at a high cost to the justice system. Base gyms are frequented by thousands of military members worldwide and those military members should expect to be able to shower and use locker and bathroom facilities free from concern of being filmed, particularly while naked in a shower. Appellant argument on this point is especially troubling as he states that "this victim was unaware of what had happened" and, but for the search, the victim "would never have known that the taping occurred." (App. Br. at 33.)

In making this argument, Appellant highlights the exact reason why suppression of this evidence would come at a high cost. But for the search authorization, Appellant would still possess a naked video of SSgt ZP and SSgt ZP would likely still not know that Appellant not only filmed the video, but still possessed it to watch again and again at his leisure, therein continuously victimizing SSgt ZP whether SSgt ZP knew it or not. Further, SSgt ZP and others would continue to believe that a base gym's locker room was a safe and protected place, which, as proved by Appellant's actions, show it is not. Here, the minimal deterrent value of suppression did not outweigh that high cost. The military judge's application of Mil. R. Evid. 311(a)(3) was reasonable, did not amount to an abuse of discretion, and should not be disturbed. Based on these circumstances, the military judge's assessment of these matters was not a "clearly unreasonable" exercise of discretion and, thus, should not be reversed.

Overall, the military judge did not abuse his discretion in denying Appellant's suppression motion. Accordingly, this Court should deny Appellant's claim.

II.

THE GOVERNMENT DID NOT VIOLATE EITHER ARTICLE 10, UCMJ, OR R.C.M. 707.

Standard of Review

This Court reviews de novo the question of whether an appellant is denied a right to speedy trial as a matter of law. United States v. Cooley, 75 M.J. 247, 259 (C.A.A.F. 2016) (*citing* United States v. Cossio, 64 M.J. 254, 256 (C.A.A.F. 2007). However, this Court reviews decisions granting delay under R.C.M. 707, thereby rendering that time excludable for speedy trial purposes, for an abuse of discretion. United States v. Guyton, 82 M.J. 146, 151 (C.A.A.F. 2022) (*citing* United States v. Lazauskas, 62 M.J. 39, 41-42 (C.A.A.F. 2005)).

Law

An accused must "be brought to trial within 120 days after . . . [p]referral of charges." R.C.M. 707(a)(1). For purposes of R.C.M. 707, an "accused is brought to trial . . . at the time of arraignment." R.C.M. 707(b)(1). Applying the speedy trial provisions of R.C.M. 707(c) does not merely consist of calculating the passage of calendar days. The rule explicitly states that certain days "shall not count for [the] purpose of computing time." R.C.M. 707(b)(1). For example, R.C.M. 707(c)(1) states that prior to referral, "[a]ll . . . pretrial delays approved by a military judge or the convening authority shall be . . . excluded" from the 120-day clock imposed by R.C.M. 707(a)(1).

"The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge . . . based on the facts and circumstances then and there existing." R.C.M. 707(c)(1), Discussion. "However, this Court requires 'good cause' for the delay and also requires that the length of time requested be 'reasonable' based on the facts

and circumstances of each case." Guyton, 82 M.J. at 151 (Citations omitted). Pursuant to R.C.M. 707(c), the military judge or convening authority "is empowered to grant delays, not blanket exclusions of time." United States v. Proctor, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003).

Under Article 10, UCMJ, once an accused is ordered into arrest or confinement prior to trial by court-martial, "immediate steps shall be taken . . . to try [the person] or to dismiss the charges and release [the person]." 10 U.S.C. § 810. This calls for a "more exacting speedy trial demand than does the Sixth Amendment." United States v. Thompson, 68 M.J. 308, 312 (C.A.A.F. 2010) (*quoting* United States v. Mizgala, 61 M.J. 122, 124 (C.A.A.F. 2005)).

This Court gives substantial deference to a military judge's findings of fact and will be reversed only if they are clearly erroneous. Mizgala, 61 M.J. at 127 (citations omitted).

Article 10 requires the Government to exercise "reasonable diligence in bringing the charges to trial." United States v. Cooley, 75 M.J. 247, 259 (C.A.A.F. 2016) (*quoting* Mizgala, 61 M.J. at 127, 129). Article 10 does not, however, require "constant motion" on the Government's part. Id. (*citing* Mizgala, 61 M.J. at 127, 129). Reasonable diligence is assessed under the four-factor framework set out in Barker v. Wingo, 407 U.S. 514 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." Cooley, 75 M.J. at 259 (*citing* United States v. Wilson, 72 M.J. 347, 351 (C.A.A.F. 2013)). "None of the four Barker factors alone are a 'necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.'" Cooley, 75 M.J. at 259 (*quoting* Barker, 407 U.S. at 533).

In the context of an otherwise active prosecution, "short periods of inactivity" do not result in an Article 10 violation, and this Court assesses "the proceeding as a whole and not mere

speed." Thompson, 68 M.J. at 312 (*quoting* Mizgala, 61 M.J. at 127, 129). The standard "is reasonable diligence, not textbook prosecution." United States v. Schuber, 70 M.J. 181, 188 (C.A.A.F. 2011).

On one hand, when "the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to," there may be an Article 10 violation. United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993). On the other, it is not unreasonable for the Government to thoroughly investigate an accused and collect and analyze all the evidence in a case. Cossio, 64 M.J. at 256 (C.A.A.F. 2007) (citation omitted).

The complexity of a case is recognized as a legitimate basis for not rushing to trial. United States v. Hatfield, 44 M.J. 22, 23 (C.A.A.F. 1996) (citation omitted). Indeed, to determine how length of delay affects an Article 10 inquiry, this Court considers "the particular circumstances of the case because the delay that can be tolerated for an ordinary street crime is considerably less than that for a serious, complex . . . charge." Cooley, 75 M.J. at 260 (*citing* Barker, 407 U.S. at 531) (internal quotes omitted).

Additional Facts

At trial, Appellant filed a motion to dismiss due to an alleged speedy trial violation on Sixth Amendment, Article 10, UCMJ, and R.C.M. 707 grounds. (App. Ex. I.) In a 25-page ruling, the military judge denied Appellant's motion. (App. Ex. XII.)

The military judge made extensive findings of fact related to the dates pertinent to the processing of Appellant's case, including the following:[5]

[5] Items in italics are not mentioned by Appellant in his brief to this Court.

Date	Event	Day Count	Cite
12 August 2022	Appellant apprehended	0	App. Ex. XII at 1.
12-15 August 2022	Appellant restricted to base	0-3	Id. at 3.
15 August 2022	Appellant enters pretrial confinement	3	Id. at 4.
17 August 2022	AFOSI Forensic Consultant receives two cellular phones, an iPhone 7 and an iPhone 13	5	Id. at 5.
22 August 2022	*Base legal office becomes aware of reports of "similar misconduct" by Appellant previous duty station in Turkey*	*10*	*Id.*
24 August 2022	AFOSI receives search authority for phones for location data only; extraction of iPhone 13 begins	12	Id.
7 September 2022	Analysis begins on iPhone 13 data	26	Id.
12 September 2022	*AFOSI and legal office, including the assigned trial team, begin attempting to identify dozens of potential victims based on photos from Appellant's cellular phone*	*31*	*Id.*
26 September 2022	Initial proof analysis sent to Numbered Air Force (NAF) for review	45	Id.
3 October 2022	*AFOSI and base legal office coordinate on expanded search authorization for Appellant's phone*	*52*	*Id.*
3 October 2022	Base legal office requests senior trial counsel	52	Id.
11 October 2022	*AFOSI updates trial counsel about finding more "covert shower" photos and videos*	*60*	*Id.*
13 October 2022	Base legal office sends final draft charges to NAF for review	62	Id.
18 October 2022	*Base legal office has received input from DF's victim counsel that DF is willing to participate in court-martial*	*67*	*Id. at 7.*
20 October 2022	*Trial counsel identifies an additional charge in addition to original charges sent to NAF*	*69*	*Id.*
26 October	*AFOSI publishes Digital Forensic Report, which disclosed 13 photos likely of DF's feet and 479 photos and videos from 2 July to 12 August 2022 that generally depict male feet, legs, and buttocks*		

26 October 2022	*Aviano fitness center provides base legal office with records; these records allow trial counsel to narrow list down to 27 potential individuals to identify the person in a video on Appellant's phone who had been recorded while showing naked at the gym*	*75*	*Id.*
28 October 2022	Preferral of Charges; trial counsel contacts Appellant's military defense counsel stating the Government can proceed to an Article 32 hearing on 7 November 2022; *Appellant's military counsel states she would speak to Appellant's civilian defense counsel*	77	Id. at 8.
7 November 2022	*Trial counsel again emails Appellant's counsel about a Defense ready date for the Article 32*	*87*	*Id.*
14-28 November 2022	*AFOSI continues to investigate other aspects of case, including identifying potential victims from Turkey*	*94-108*	*Id. at 9*
16 November 2022	*Base legal office emails Appellant's counsel again for Article 32 availability*	*96*	*Id. at 8.*
21 November 2022	*Appellant's counsel responds, stating "Working on getting Defense availability to you and will follow up as soon as possible"*	*101*	*Id.*
29 November 2022	*Base legal office emails Appellant's counsel again for Article 32 availability*	*109*	*Id.*
2 December 2022	*SSgt ZP identifies himself in several photographs showing SSgt ZP fully nude showering at the fitness center*	112	*Id. at 9*
7 December 2022	*SSgt ZP signs AF IMT 1168*	117	*Id.*
12 December 2022	Defense proposes 28 December 2022 date for Article 32	122	Id. at 8.
19 December 2022	Preliminary Hearing Officer appointed	129	Id. at 9.
20 December 2022	*AFOSI and trial counsel exchanged emails about USACIL reports related to bed sheet and fingerprint analysis*	*130*	*Id.*
20 December 2022	*Base legal office sends DF 12-page document including 11 pictures for review*	*130*	*Id. at 10.*
20 January 2023	*Additional charge preferred related to SSgt ZP*	*161*	*Id.*
20 January 2023	Special Court-Martial Convening Authority (SPCMCA) excludes the following time periods for R.C.M. 707 purposes:	161	Id.

	11 October 2022 – 6 November 2022 (time to identify and secure evidence related to SSgt ZP) 7 November – 27 December 2022 (defense unavailability for Article 32)		
24 January 2023	*Case referred*	*165*	*Id.*
24 January 2023	*AFOSI "cracks" Appellant's iPhone 7 and begins examination*	*165*	*Id. at 11.*
1 February 2023	Trial counsel notified defense that Government Case Ready Date for trial was 20 February 2023 and requested defense availability	173	Id.
2 February 2023	*Defense sends first discovery request to trial counsel, which includes a demand for speedy trial*[6]	*174*	
3 February 2023	*Trial counsel again requested Case Ready Date from defense*	*175*	*Id.*
6 February 2023	*Defense states earliest available date for trial was 1 May 2023 and requests Article 39(a) session for 23-24 February 2023*	*178*	*Id.*
6 February 2023	*Trial counsel sends docketing memo to Central Docketing Office; parties agree to exclusion of time between 20 February 2023 and 1 May 2023*	*178*	*Id.*
23 February 2023	Appellant arraigned	195	Id. at 12.

Regarding Appellant's R.C.M. 707 claim, the military judge found the SPCMCA's exclusions of time legally valid. (App. Ex. XII at 20.) For the first exclusion of time from 11 October 2022 until 6 November 2022, the military judge found that AFOSI informed trial counsel on 11 October of the discovery of more "covert shower" photos and videos and that AFOSI was "going to dig deeper to try and uncover exact location data from the photo and videos." (Id.) Meanwhile, the base legal office began working directly with the base fitness center staff in an attempt to identify an individual in one of the videos and, by 26 October 2022,

[6] The military judge specifically found there was "no other evidence before this court that any other demands for speedy trial were made by [Appellant]." (App. Ex. XII at 11.)

had narrowed the number of possibly victims to 27 individuals. (Id.) Additionally, during this timeframe, AFOSI published its Digital Forensic Report and continued to investigate an alleged indecent recording allegation.

The military judge held that while the Government "may have had sufficient evidence to move forward on the 12 August 2022 incident, the Government was also well-aware of other evidence tending to show [Appellant's] 'modus operandi.'" (Id. at 21.) The military judge further held that during the excluded time, AFOSI and the base legal office "narrowed down the list of potential victims to 27," isolated the fitness center as a likely crime scene of a separate crime from the 12 August 2022 incident at the TLF, and "was working diligently to identify other victims," efforts for which the military judge noted "paid off on 2 December 2022 when SSgt ZP identified himself in one of the videos." (Id.)

The military judge also held this timeframe was reasonable because the "Government only sought exclusion beginning on the date [AFOSI] narrowed the 'covert shower' photos and videos to the fitness center," and did not seek to exclude the entire time AFOSI was analyzing Appellant's phones. Additionally, the military judge noted the Government ended the excluded period on 7 November 2022, "nearly a month prior to SSgt ZP being identified as a victim." (Id.)

As to the second timeframe from 7 November 2022 to 27 December 2022, the military judge found good cause for the exclusion because the Government's ready date for the Article 32 was on 7 November 2022 while the Defense's ready date was not until 27 December 2022. (Id.)

Regarding Appellant's Article 10 claim, the military judge analyzed each Barker factor. The military judge first noted Appellant did not challenge the processing of Appellant's pretrial confinement. (Id. at 22.) Noting Appellant's argument was "that the Government had all the

evidence it needed to pursue the 12 August 2022 offenses shortly after the incident itself," the military judge stated, "The Defense's argument, however, ignores other relevant facts and circumstances of this case." (Id.) The military judge then highlighted the following: (1) the Government's awareness of potential similar misconduct while stationed in Turkey; (2) the Government seizure of two cellular phones that required analysis; (3) the later analysis confirmed evidence of the 12 August 2022 offenses existed on Appellant's phone; and (4) the analysis also identified other photos and videos proving Appellant's modus operandi. (Id.) The military judge surmised, "Put simply, the Government suspected there was more to [Appellant's] case than the incident on 12 August 2022," a suspicion that "was confirmed in early October and another victim was actually identified by 2 December 2022." (Id. at 23.)

The military judge, comparing this case to Cossio, stated "the Government here was awaiting the conclusion of the forensic analysis of [Appellant's] cell phone before making charging decisions." (Id.) The military judge continued, "Although the Defense requests this court look at the 12 August 2022 offenses in isolation and find this case was not complex, the court is unwilling to do so." The military judge then highlighted that, on 12 August 2022, Appellant was alleged to have entered Mr. DF's lodging room with the intent to commit an assault consummated by battery, while also alleged to have touched DF's anus with an intent to gratify his sexual desire. Additionally, Appellant was also charged with recording SSgt ZP while naked in the shower. The military judge stated that while his offenses may have appeared simple factually, "the investigative steps required to uncover the evidence needs to prove all of these offenses was complex," adding that Appellant's phone required forensic analysis and that both the trial counsel and investigators had to seek ways to match photos and videos found on

Appellant's phone to actual victims. Considering this, the military judge found the first Barker factor weighed in the Government's favor.

As to the reasons for delay, the military judge found that the Government "spent the Fall of 2022: (1) thoroughly investigating all known misconduct involving [Appellant] before proceeding to trial; and (2) attempting to identify other individuals who themselves were unaware that they were victims of a crime." (Id.) The military judge also stated "at least 51 days [of delay] in this case is directly attributable to the Defense." Based on these reasons, the military judge found the second Barker factor weighed in the Government's favor.

As for the third factor, the military judge found Appellant "only made one demand for speedy trial, and that request was made on 2 February 2023, 171 days after [Appellant] entered pretrial confinement." (Id. at 24.) The military judge also highlighted this request "came the day after the Government informed the Defense Counsel that its ready date for trial was 20 February 2023," but that the Defense case ready date was not until months later - 1 May 2023. (Id.) Based on these circumstances, the military judge found the third Barker factor "only slightly weighs in favor of [Appellant]." (Id.)

Finally, as to prejudice, the military judge noted that many of the concerns raised by Appellant, such as the confinement facility providing Appellant basis needs and an unruly fellow inmate, had been previously raised by Appellant to Appellant's First Sergeant, MSgt MP, who had then contacted the confinement facility. Confinement personnel told Appellant's First Sergeant that Appellant had also raised these concerns to them and that the concerns were being addressed. (Id.)

Importantly, with regard to Appellant's preparation with his defense team, the military judge "recognize[d] the added layers of difficulty in preparing a defense when an [Appellant] is

not only in pretrial confinement, but also in a confinement facility geographically separated from Defense Counsel." (Id.) However, the military judge held "there is no evidence before the court that [Appellant] has not been able to reach his Defense Counsel when needed," adding, "To the contrary, MSgt [MP] stated that during his last conversation with [Appellant], [Appellant] asked MSgt MP to not contact him anymore and that if [Appellant] needed anything, he would ask his defense team or mother." (Id.) The military judge continued, "there is no evidence before the court that the Defense Counsel have had any trouble reaching [Appellant] in pretrial confinement." (Id.)

Ultimately, the military judge found there "has not been any significant period of unreasonable or unexplained delays on the part of the Government," adding that from 12 August 2022 until 23 January 2023, "the Government has exercised reasonable diligence in bringing [Appellant] to trial." (Id. at 25.) The military judge found the Government was "not limited to pursuing only the 12 August 2022 incident, but was entitled and justified in thoroughly investigating all known offenses involving [Appellant]." The military judge also recognized that the Government knew it had to "strik[e] a balance of fully investigating [Appellant], and attempting to identify other victims, while at the same time not losing sight of the fact that [Appellant] was in pretrial confinement," and that the "Government acknowledged it needed to prefer the original charges while continuing the investigation precisely because of [Appellant's] speedy trial rights." (Id.)

Analysis

Here, while Appellant claimed violations of the Sixth Amendment, Article 10, UCMJ, and R.C.M. 707 at trial, Appellant now only claims violations of Article 10, UCMJ, and R.C.M. 707. However, Appellant has shown no cause for relief.

- *Article 10, UCMJ*
    - *Factors One and Two: Length and Reasons for Delay*

Any delay in bringing Appellant to trial was reasonable considering the circumstances of this case. Thus, these factors weigh in the Government's favor. Indeed, the timeline above shows "reasonable diligence" on the Government's part. *See* Cooley, 75 M.J. at 259. However, Appellant believes otherwise, claiming that the Government "took their time, fished for evidence of additional offenses, and delayed the investigation into the 10 August video." (App. Br. at 27.)

Yet, in making his assertions, Appellant omits numerous events that took place during AFOSI's investigation and the court-martial processing of Appellant's case. For instance, Appellant fails to make any mention of the base legal office becoming aware in August 2022 of reports of similar misconduct at Appellant's previous duty station in Turkey. Appellant also fails to mention the tedious identification process faced by both AFOSI and the legal office during September 2022 as they attempted to identify potential victims based on photographs found on Appellant's phone.

Here, Appellant contends the Government should have "tak[en] the evidence available by 18 August 2022 and preferr[ed] the original charges." (App. Br. at 25.) However, Appellant's contention is not the law. As noted above, the law does not force the Government to prefer charges only on what information is known to the Government at the time of Appellant's entrance into pretrial confinement. Instead, the Government is allowed to investigate an accused and collect and analyze all the evidence in a case, so long as the Government shows a "reasonable diligence" in doing so. *See* Cossio, 64 M.J. at 256; Schuber, 70 M.J. at 188.

Here, as the military judge found at trial, the Government showed "reasonable diligence" during the investigation of Appellant from August through November 2022, which included (1)

cellular phone extractions and analysis; (2) the analysis of over 475 photos and videos found on those phones; (3) the identification of individuals portrayed in those photos and videos; and (4) investigation into potential similar misconduct at Appellant's prior duty station. Moreover, as the military judge surmised, "Put simply, the Government suspected there was more to [Appellant's] case than the incident on 12 August 2022," a suspicion that "was confirmed in early October and another victim was actually identified by 2 December 2022." (Id. at 23.)

Still, Appellant finds fault. He first claims the Government did not assign an Assistant Trial Counsel until 3 October 2022. (App. Br. at 22.) However, the military judge's findings of fact state that the assigned trial team, as early as 12 September 2022, was assisting AFOSI in attempting to identify dozens of potential victims from photos found on Appellant's phone. (App. Ex. XII at 5.) Further, even Appellant admits a draft proof analysis was completed by 13 September 2022. Appellant's contention here that prosecutors did not get involved in his case until October 2022 is mistaken.

Next, Appellant highlights that charges were preferred in his case on 28 October 2022, 77 days after Appellant began pretrial restraint. However, Appellant fails to note this preferral occurred *before* AFOSI concluded its investigation and *before* all the victims that eventually appeared on Appellant's charge sheet were even identified. The preferral also came only two days after AFOSI published its Digital Forensic Report, which involved the review of over 475 photos and videos found on Appellant's phone. As the military judge held, the Government's action of preferring charges despite an ongoing investigation and despite not yet knowing of all victims in this case highlights its awareness and "reasonable diligence" in bringing Appellant to trial in an expeditious manner.

The Government's "reasonable diligence" continued in November, after Appellant's charges were preferred, by continuing to identify potential victims and other aspects of the investigation. In the meantime, the legal office was attempting to schedule an Article 32 hearing with the Defense.

Here, Appellant's brief differs greatly from the reality of these scheduling attempts. In his brief, Appellant claims the "Government notified the defense that they would be ready to conduct the Article 32, UCMJ, hearing on 7 November 2022," but "then *waited* until 12 December 2022 for the defense to propose a date for the Article 32, UCMJ, hearing." (Ap.. Br. at 24.) (emphasis added.) However, Appellant makes multiple serious omissions – namely the *three additional times* the Government contacted the defense requesting their availability. The Government first contacted the defense on 28 October stating it could proceed to an Article 32 hearing on 7 November 2022. (App. XII at 8.) Appellant's military defense counsel told the Government she would speak to Appellant's civilian defense counsel.

On 7 November 2022, trial counsel again emailed Appellant's counsel about an Article 32 date. (Id.) On 16 November 2022, the Government again emailed Appellant's counsel for their availability. (Id.) On 21 November 2022, Appellant's counsel responded saying they were "[w]orking on getting Defense availability." (Id.) Then, on 29 November 2022, the Government again requesting Appellant counsels' availability. Finally, on 12 December 2022, the defense proposed the 28 December 2022 date. (Id.)

Appellant's brief mentions none of the facts from the previous paragraph, all of which were found as fact by the military judge at trial. Instead, Appellant appears to obfuscate them by not only claiming that the Government "waited" a month to hear from the defense, but also stating, "*If* the defense was unavailable on that date, they could have submitted a request for

delay." (App. Br. at 27.) Here, with his "if" language, Appellant seemingly implies there was some uncertainly as to whether the defense was unavailable on the Government's ready date for the Article 32. Yet, the record plainly shows Appellant's counsel were not available on that date. While Appellant chose to omit this fact in his brief, the record is clear on this point.

Here, contrary to Appellant's contention, the Government did not ask about defense's availability on 28 October 2022 and then "wait" until 12 December 2022 for an answer. Instead, the Government repeatedly asked Appellant's counsel throughout the month of November for Article 32 availability dates to no avail until Appellant's counsel finally answered the repeated requests on 12 December 2022. Appellant's omission of this information severely undermines his delay claim, especially considering any delay during this 51-day timeframe was, as the military judge held, "directly attributable to the Defense." (App. Ex. XII at 23.)

Next, Appellant complains that the Article 32 PHO was "not appointed until 19 December 2022." (App. Br. at 24.) However, the appointment of a PHO was dependent on a firm Article 32 date being set. As detailed above, despite repeatedly asking for the defense to commit to an Article 32 date for over six weeks, the defense did not provide the Government a firm Article 32 hearing date until 12 December 2022. Thus, any delay in the appointment of a PHO was due to Appellant's counsels' own delay in responding to the Government with a hearing date. Further, the appointment date of the PHO is of no consequence here since the Article 32 occurred on the day Appellant's counsel requested – 28 December 2022. The PHO's appointment date did not delay the Article 32 in any fashion.

Appellant next claims the "investigation into ZP's identity also appeared to be unnecessarily drawn out." (App. Br. at 25.) However, Appellant acknowledges that the Government was not aware of the video involving ZP until 11 October 2022, and that, on 26

October 2022, just two days before the original charges were preferred on Appellant, ZP had still not been identified as the list of potential individuals in the video still numbered 27 people. (Id.) While Appellant notes that AFOSI did not interview ZP until 2 December 2022, this fact did not cause any delay in the overall processing of Appellant case since, as noted above, the overall court-martial processing of Appellants' case was delayed from 7 November 2022 until 28 December 2022 due to the defense's unavailability for an Article 32 hearing.

As to the timeframe after the Article 32 hearing, Appellant seemingly takes no issue with the amount of time the Government took between Appellant's Article 32 hearing and the case's referral on 24 January 2023. During this time, however, the Government continued its "reasonably diligent" processing, which involving preferring an additional charge against Appellant.

Finally, Appellant notably fails to mention why his court-martial trial did not begin until 1 May 2023. In his brief, Appellant states "the Government notified the defense that their first available date for trial was 20 February 2023" and that "[t]rial began on 1 May 2023." (App. Br. at 23.) However, Appellant fails to state reason for the delay between 20 February 2023 and 1 May 2023 was because of his own counsels' unavailability for trial. While most of the timeframe occurred after Appellant's arraignment, and thus outside of the 195-day timeframe at issue, this fact still highlights the Government's "reasonable diligence" in prosecuting Appellant as quickly as possible. Like the 51-day delay mentioned above, this additional 70-day delay from the Government's Case Ready Date to the defense's Case Ready Date was also directly attributable to Appellant.

All told, now that this Court has been presented with the entire pretrial processing timeline for Appellant's case, this Court should be convinced that any delay in Appellant's case

was reasonable considering the circumstances. Based on the degree of evidence and scope of investigation in this case, the Government showed reasonable diligence throughout the investigative stage of Appellant's case, even going so far as to prefer charges prior to Appellant's investigation being complete. Then, once charges were preferred, the overwhelming majority of time between preferral and Appellant's Article 32 hearing was due to the defense's availability, not the Government's. For these reasons, the first and second Barker factors weigh in the Government's favor.

- *Factor Three: Appellant's Demand for Speedy Trial*

While Appellant did make a request for a speedy trial, any request by him was tempered by the Defense's 1 May 2023 Case Ready Date which was over two months after the Government's Case Ready Date of 20 February 2022. Delay "caused by the defense weighs against the defendant." Vermont v. Brillon, 556 U.S. 81, 90 (2009). Indeed, a demand for speedy trial should come with it a defense counsel who is ready to proceed with haste. Appellant's omission of the Defense's 1 May 2023 Case Ready Date within this issue highlights the significantly detrimental effect it has on Appellant's claim.

Recently, this Court addressed a similar scenario in United States v. Taylor, ACM 40371, 2024 CCA LEXIS 316 (A.F. Ct. Crim. App. 31 July 2024). There, an appellant demanded speedy trial twice, but this Court found "both demands somewhat hollow, and at best conveyed mixed signals," because, on the date of the first demand in December 2021, the defense counsel also indicated the defense would not be ready for trial under May 2022. Considering this, this Court found "this factor weighs in neither party's favor." Id.

The same should hold true in this case. As detailed above, while the Government sought to hold an Article 32 hearing days after preferral, Appellant delayed the Article 32 hearing for 51

days. Then, despite making a demand for speedy trial on 2 February 2023, the Defense, just four days later, told the Government it could not go to trial before 1 May 2023, which was another 70-day delay. Considering these "mixed signals," this factor should not weigh in either party's favor.[7] *See* Taylor, at *78.

- *Factor Four: Prejudice*

Finally, Appellant faced no prejudice in any delay prior to the trial. To start, our superior Court has made clear that pretrial confinement is not "per se prejudicial." Cooley, 75 M.J. at 262. The fact that Appellant was in pretrial confinement does not alone create prejudice. Moreover, none of Appellant's described conditions were oppressive, but rather reflect the expected conditions of pretrial confinement.

Next, as found by the military judge, many of the complaints alleged by Appellant now, including various generalized medical concerns and anxiety, were addressed by either Appellant's first sergeant or confinement officials when Appellant raised those issues to them. Further, Appellant's own statement shows he received medications for any increased anxiety during his pretrial confinement. (*See* App. Ex. V.)

Further, while in pretrial confinement, Appellant specifically told his first sergeant, MSgt MP, to no longer contact him while in pretrial confinement. (App. Ex. VII.) Thus, Appellant cannot claim that any supposed confinement conditions went unanswered when he specifically cut off perhaps the most influential person to advocate for Appellant –his first sergeant. Notably, this was the same first sergeant who *did* advocate for Appellant when issued were raised to him.

[7] Indeed, Appellant's own delays accounted for nearly half of the overall 262-day timeframe between Appellant's restraint on 12 August 2022 and Appellant's trial commencing on 1 May 2023.

Next, Appellant claims he had "difficulty accessing his attorneys" and "could also not access electronic resources to any significant degree to assist in his defense." (App. Br. at 26.) However, the military judge found that Appellant "there is no evidence before the court that [Appellant] has not been able to reach his Defense Counsel when needed." (App. Ex. XII at 24.) As noted above, this Court gives substantial deference to a military judge's findings of fact and will be reversed only if they are clearly erroneous. Mizgala, 61 M.J. at 127 (citations omitted).

Moreover, the military judge also noted the juxtaposition between Appellant's claim that he could not reach his counsel with Appellant's statement to MSgt MP, Appellant's first sergeant, to not contact him anymore because he could get anything he needed from his defense team or his mother. (Id.) Appellant's statement to MSgt MP here provides a clear indication that Appellant had ready contact with his defense team. Further, as the military judge also found, "there is no evidence before the court that the Defense Counsel have had any trouble reaching [Appellant] in pretrial confinement." (Id.)

Overall, as to prejudice, the three recognized interests of prejudice are (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. Mizgala, 61 M.J. at 129. Here, Appellant's claims do not amount to "oppressive pretrial incarceration." Further, Appellant's own statement shows he began receiving anxiety medication while in confinement, there in minimizing Appellant's anxiety and concern and showing he was not denied medical care. Finally, there is no evidence that Appellant's access to defense counsel was obstructed, thus, limiting the possibility that the defense would be impaired. In fact, Appellant's access to his defense counsel was so readily available, he specifically cut off contact with his own first sergeant. As a result, this factor weighs in the Government's favor.

As to Appellant's overall claim, the timeline and circumstances described above show the Government acted with reasonable diligence in bringing Appellant to trial, and the military judge did not error in determining the same. Here, under Article 10, UCMJ, any delay in this case was not unreasonable. Here, investigators, the legal office, and the convening authority moved the case to trial in reasonably diligent fashion. Further, Appellant has failed to show any prejudice in any delay in this case. Thus, this Court should deny Appellant's claim.

- *R.C.M. 707*

Here, the SPCMCA did not abuse his discretion in excluding the two timeframes, and the military judge did not err in denying Appellant's motion. As the military judge properly held, the first exclusion of time from 11 October 2022 until 6 November 2022 began on the date AFOSI informed trial counsel of the discovery of more "covert shower" photos and videos and that AFOSI was "going to dig deeper to try and uncover exact location data from the photo and videos." (App. Ex. XII at 20.) Also during this time, the base legal office began working directly with the base fitness center staff in an attempt to identify an individual in one of the newly discovered videos and, by 26 October 2022, had narrowed the number of possibly victims to 27 individuals. (Id.) Further, on the same date, AFOSI published its Digital Forensic Report and continued to investigate an alleged indecent recording allegation.

Here, as the military judge further held, during this excluded time, AFOSI and the base legal office "narrowed down the list of potential victims to 27," isolated the fitness center as a likely crime scene, and "was working diligently to identify other victims," efforts for which the military judge noted "paid off on 2 December 2022 when SSgt ZP identified himself in one of the videos." (Id. at 21.)

Still, Appellant finds fault because he claims the Government "did not take substantial steps to identify the individual depicted or to advance the investigation between 11 October 2022 and 6 November 2022." (App. Br. at 28.) However, Appellant then contradicts himself by admitting that, during this time, "the Government received the sign-in roster from the Fitness Center and narrowed the list down to 27 individuals." (Id.) Here, the Government took multiple steps during this timeframe to identify and secure evidence related to SSgt ZP. Thus, the SPCMCA did not abuse his discretion in excluding this timeframe.

Notably, the SPCMCA did not exclude the entire time AFOSI was analyzing Appellant's phones but instead, as the military judge found, only began excluding time on the date AFOSI narrowed the "covert shower" photos and videos to the fitness center. Moreover, even though the exclusion was based on time to identify and secure evidence related to SSgt ZP, the Government ended the excluded timeframe on 6 November 2023, almost one month prior to SSgt ZP being identified as a victim. This timeframe, rather than a "blanket exclusion of time," instead was a length of time that was "'reasonable' based on the facts and circumstances" of this case. *See* Guyton, 82 M.J. at 151 (Citations omitted).

Likewise, the SPCMCA did not abuse his discretion in excluding the timeframe from 7 November 2022 until 27 December 2022. Here, the record clearly shows the Government ready date for the Article 32 was 7 November 2022 and, though Appellant omitted numerous facts related to this issue, Appellant's counsel were not ready to proceed until 28 December 2022. Thus, the SPCMCA correctly excluded this timeframe as the delay was not fault of the Government.

Still, Appellant claims fault while repeating the same unpersuasive arguments he makes within his Article 10 claim above. Here, Appellant again claims the Government "did not have a

Preliminary Hearing Officer appointed" and "did not schedule the Article 32, UCMJ, hearing and require the defense to request excludable delay," but instead was "content to wait for the defense to provide a date." (App. Br. at 28.) Again, as discussed above, the Government did not "wait" for anything – instead the Government repeatedly requested over the course of more than a month for the Defense to provide availability for an Article 32 hearing. There was no "waiting" – there instead was a continual lack of response from the Defense to the Government's repeated inquiries that began on 28 October 2022 and continued on 7 November 2022, 16 November 2022, and 29 November 2022.

Here, after reviewing all the evidence, the military judge determined as a finding of fact that the Government was ready to proceed with an Article 32 hearing on 7 November 2023, and this Court will only reverse a military judge's findings of facts if they are clearly erroneous. Mizgala, 61 M.J. at 127 (citations omitted). Appellant's unpersuasive claim, based on an incomplete recitation of the facts of this case, fails to show the military judge's finding was clearly erroneous. Accordingly, as the Government's case date for the Article 32 was 7 November 2023, the SPCMCA did not abuse his discretion in excluding the time from 7 November 2023 until 27 December 2023 for R.C.M. 707 purposes. With these proper exclusions, Appellant was brought to trial in 114 days. Thus, there, is no R.C.M. 707 violation.

In sum, Appellant has failed to show the military judge erred in denying his speedy trial claim, either under Article 10 or R.C.M. 707. Thus, Appellant's claim must fail.

III.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING 404(b) EVIDENCE.

Standard of Review

Appellate courts review a military judge's ruling pursuant to Mil. R. Evid. 404(b) for an abuse of discretion. United States v. Hyppolite, 79 M.J. 161, 164 (C.A.A.F. 2019). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) ("[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.") "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous" in order to be invalidated on appeal.'" United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (*quoting* United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980), aff'd on other grounds, 9 M.J. 417 (C.M.A. 1980)).

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010). When judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. Id.

Law

Mil. R. Evid. 404(b)(1) prohibits evidence of a crime, wrong, or other act from being used to prove that an accused had a certain character and that the accused acted in accordance with that character during the charged offense(s) – this is commonly referred to as propensity evidence. Hyppolite, 79 M.J. at 161 (C.A.A.F. 2019). However, evidence of a crime, wrong, or other act may be admissible for another purpose. Id. One proper purpose of evidence of a crime, wrong, or other act is to show a common plan or scheme. Id. at 165. Evidence may be admissible for one purpose but not for others. Id. at 164. "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002) (*quoting* Huddleston v. United States, 485 U.S. 681, 686 (1988)).

When a court looks to evidence of uncharged acts, it tests its admissibility under three standards: (1) Does the evidence reasonably support a finding by a preponderance of the evidence that the accused committed prior crimes, wrongs, or acts? (2) What fact of consequence is made more or less probable by the existence of this evidence, and (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice. United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). The evidence at issue must fulfill all three prongs to be admissible. United States v. Barnett, 63 M.J. 388, 394 (C.A.A.F. 2006) (*quoting* United States v. Berry, 61 M.J. 91, 95-96 (C.A.A.F. 2005)). Mil. R. Evid. 404(b) "is a rule of inclusion rather than exclusion." United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000). Consistent with prevailing federal practice under Fed. R. Evid. 404(b), on which Mil. R. Evid. 404(b) is based, C.A.A.F. "has applied the Reynolds test to subsequent acts as well." United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001).

In a recent unpublished opinion, United States v. Greene-Watson, ACM 40293, 2023 CCA LEXIS 542 (A.F. Ct. Crim. App. 27 December 2023) (unpub. op.), this Court highlighted the following related to the issue of a "common plan or scheme" under Mil. R. Evid. 404(b):

> Pertinent to this case, evidence of a common plan or scheme has long been recognized as a legitimate, non-propensity purpose under Mil. R. Evid. 404(b). *See, e.g.*, United States v. Johnson, 49 M.J. 467, 474-75 (C.A.A.F. 1998); United States v. Munoz, 32 M.J. 359, 364 (C.M.A. 1991); United States v. Reynolds, 29 M.J. 105, 105-06 (C.M.A. 1989). In Hyppolite, the CAAF revisited the parameters of common plan or scheme evidence. The CAAF endorsed a substantial similarity test employed by the military judge in assessing whether the evidence qualified as a common plan or scheme, and affirmed the trial judge's reliance upon a three-factor test in ruling upon the evidence: (1) relationship between the alleged victim and the accused; (2) surrounding circumstances of the preceding misconduct; and (3) nature of the alleged misconduct involved. Hyppolite, 79 M.J. at 166-67.

Greene-Watson, at *27-28.

When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000). The military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *See, e.g.*, United States v. Baldwin, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (*citing* Stephen A. Saltzburg et al., Military Rules

In the event of non-constitutional error in admitting Mil. R. Evid. 404(b) evidence, this Court reviews for harmless error. Whether an error is harmless is a question of law this Court reviews de novo. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017) (*quoting* United States v. McCollum, 58 M.J. 323, 342 (C.A.A.F. 2003)). "For non-constitutional errors, the

Government must demonstrate that the error did not have a substantial influence on the findings." Id. (*quoting* McCollum, 58 M.J. at 342). "We evaluate the harmlessness of an evidentiary ruling by weighing: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" Id. at 89 (*quoting* United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Additional Facts

Before trial, the Government provided notice to the Defense that, pursuant to Mil. R. Evid. 404(b)(2), it intended to introduce evidence at trial of various uncharged acts. This evidence included the following, along with the reason for its introduction:

Evidence	Basis for Introduction
A video made by Appellant on 8 August 2022 inside the Aviano base gym where Appellant, wearing black shoes, walks towards a locker room shower, gets on the floor, and attempts to stick his phone in the shower to record an individual showering	Show identity and common scheme or plan Appellant uses to film individuals in the base gym shower
245 photos and videos of other individual's feet found on Appellant's cell phone	Show Appellant's motive intent to commit the breaking and entering offense in Charge III
A video made by Appellant on 4 August 2022 outside what appears to be a lodging facility of an individual lying in bed with his or her feet out	Show Appellant's common scheme, plan, preparation, and intent to commit the breaking and entering offense in Charge III

(App. Ex. XXII at 5.)

Appellant sought to exclude this evidence. In a 16-page ruling, the military judge denied Appellant's motion. (Id.) The military judge analyzed each set of evidence separately and performed a Mil. R. Evid. 403 balancing test on each.

- *4 August 2022 Video*

The military judge first rejected the Government's position that the video showed a common scheme or plan as the video does not show Appellant breaking into a residence or touching the individual's feet. The military judge said this video showed Appellant peeping through a window, not breaking and entering. (Id. at 12.)

However, applying the Reynolds test, the military judge did say the video could be offered to show preparation and intent. As to the first Reynolds prong, the court held that members could find this other act was committed by Appellant as the video was found on Appellant's cell phone and matched similar behavior from Appellant based on hundreds of other videos and photos found on his phone. (Id.)

As to the second prong, the military judge found the video was relevant as to preparation and intent. First, the video was taken only eight days prior to the 12 August incident, the recording was taken at night, and outside of a window of a lodging facility. The military judge found that a factfinder could determine this evidence tended to show Appellant was preparing for the 12 August 2022 incident by "creeping around a lodging facility at night," and that "peering in windows could be viewed as testing the waters and increase [Appellant's] confidence that he would not be discovered, even if he went a step further and actually entered a dwelling place." (Id.)

The military judge also ruled the recording was relevant to Appellant's intent "as it tends to show his state of mind, particularly his interest in feet," adding that the features of the video – Appellants interest in feet and an unknowing victim – was similar to the events that occurred on 12 August 2022.

Finally, the military judge held the evidence was legally relevant and passed a Mil. R. Evid. 403 balancing test. The judge stated the probative value substantially outweighed any danger of unfair prejudice, noting that the recording did not show a touching (meaning the evidence was less serious than the facts of the Charge III offense). The military judge also noted that Appellant planned to be tried by a military judge alone, which would eliminate the risk that "the evidence will be used for any impermissible purposes that could confuse the issues or mislead the factfinder." (Id.)

The military judge also highlighted that the Government originally provided notice of 5 recordings and 15 photos from 4 August 2022, but only provided one recording to the military judge. The military judge stated the Government would be allowed to admit only the one video to show preparation and intent and would not allow the Government to introduce any other recordings or photos.

- *8 August 2022 Video*

To the first Reynolds prong, the military judge held that if the Government could prove the recording came from Appellant's cell phone at trial, then "the court finds the factfinder could determine [Appellant] made the recording, and committed the acts depicted therein by a preponderance of the evidence." (Id. at 13.)

As to the second prong, the military judge found the video was relevant as to show identity and a common scheme or plan. First, the video showed an individual wearing similar shoes as the person who made the video on 10 August 2022 of SSgt ZP. The judge stated, "Offering this to show distinctive shoes tending to show [Appellant] as the perpetrator on 10 August 2022 is relevant and [Appellant's] identity is a fact of consequence in this case." (Id.)

The military judge also found the "scheme/plan employed by [Appellant] in the 8 August 2022 recording is relevant as it is nearly identical to his actions two days later." (Id.) The judge noted that both recordings (1) involve a victim who is in the shower "and while [Appellant] is aware of what he is doing, the individual in the shower was not;" (2) occurred at the same place – the base gym; (3) had identical nature and circumstances, namely Appellant "secretly recording an individual in the shower by placing a phone under the shower curtain;" and (4) the time span between the two videos was only two days. (Id.)

The military judge noted the Defense's argument at trial that the 8 August 2022 was not evidence of a common scheme or plan because that video did not show the private parts of the filmed individual. However, the military judge was not persuaded, stating that what "is relevant is the scheme/plan – not the outcome," adding that in both videos, Appellant "waits for an opportunity, crouches down, puts his phone under the curtain and aims it at the shower hoping to record" a person showering. (Id.)

Finally, the military judge held the evidence was legally relevant and passed a Mil. R. Evid. 403 balancing test. The judge noted that the Defense's argument that the 8 August 2022 did not show a naked individual cut against them on this prong as it "diminishes the prejudicial effect." (Id. at 14.) The military judge held the probative value was not outweighed by the danger of prejudice, while again noting the trial would be by military judge alone, which would eliminate the danger that the video would be used for any improper purpose or for a purpose other than identity and common scheme or plan.

- *Photos and Videos of Feet Found on Appellant's Cell Phone*

To the first Reynolds prong, the military judge held that if the Government could prove that Appellant possessed these photos and videos on his cell phone, this prong would be met. (Id. at 14.)

As to the second prong, the military judge found the photos and videos were relevant to show Appellant's intent and motive. Like the 4 August 2022 video, the military judge found Appellant's "state of mind in the commission of both the uncharged acts of either creating or possessing these photos and videos and the acts charged in Charge III were "sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offense." (Id.) The military judge also held the "extent of this evidence could also lead the factfinder to believe [Appellant] had the motive to enter [Mr. DF's] room and touch his feet," as the evidence "clearly establishes [Appellant's] interest in feet and that could have driven him to commit the offense charged in Charge III." (Id.)

Finally, the military judge held the evidence was legally relevant and passed a Mil. R. Evid. 403 balancing test. The judge noted that the Defense's argument might be stronger "if the Government was attempting to admit hundreds of images and recordings of feet taken over the course of years," as this might lead a factfinder to believe Appellant was a bad person. (Id.) However, since the Government was "simply seek[ing] to elicit testimony about the timing, quantity, and nature of the photos," the military judge held any prejudicial effect was diminished. Further, the military judge again noted the trial would be by military judge alone, and that there "is no danger that the court will be confused or misled by this evidence." (Id. at 15.)

Ultimately, the military judge allowed "testimony generally describing the timing, quantity, and nature of the photos and recordings found on [Appellant's] cell phone" for its

tendency to show Appellant's "motive and intent to commit the offense alleged in Charge III and to show [Appellant's] interest in feet (to explain why [Appellant] may have committed the offenses alleged in Charge II and Charge III)." (Id.)

Argument

To begin, the *Law and Argument* section of Appellant's brief states that evidence of other acts "must be 'almost identical' to the charged acts to naturally suggest that all of these acts resulted from the same plan." (App. Br. at 31, *citing* United States v. Brannan, 18 M.J. 181, 183 (C.M.A. 1984)). However, Appellant's recitation of law on this point is incorrect.

While common plan or scheme requires substantial similarity, case law does not require that the evidence be "almost identical." Hyppolite, 79 M.J. at 167. *Cf.* United States v. Morrison, 51 M.J. 117 (C.A.A.F. 1999) (*quoting* United States v. Brannon, 18 M.J. 181 (C.M.A. 1984). Somewhat confusingly, the Morrison decision included two quotes appearing to require plan evidence to be "almost identical. Id. The quote "almost identical" comes from Brannon, 18 M.J. at 193. Unfortunately, the language in Brannon is simply an out-of-context quote from another opinion: United States v. Danzey, 594 F.2d 905 (2d Cir. 1979). The language being quoted in Danzey comes from a discussion of modus operandi evidence. Id. at. 913. Read correctly, Morrison, Brannon, and Danzey hold only that evidence offered "to show modus operandi" must be more similar than other evidence of plan. Morrison, 51 M.J. at 120. The law does not require "almost identical" circumstances for all plan evidence. As this Court noted in Greene-Watson, our superior court's more recent opinion in Hyppolite made this clear. Hyppolite, 79 M.J. at 167.[8] The standard is "substantially similar." Id.

[8] Our superior Court has granted review of Greene-Watson.

Next, Appellant begins his attack on the military judge's ruling by stating that the admitted evidence "was cumulative to evidence of the offenses themselves or to other evidence offered under Mil. R. Evid. 404(b) that was not challenged." (App. Br. at 32.) In making his assertion, Appellant cites to our superior Court's recent decision in United States v. Wilson, No. 23-0225, 2024 CAAF LEXIS 287 (C.A.A.F. 23 May 2024). However, the portion of Wilson cited by Appellant was only joined by two members of the Court, making it non-binding.

For the 8 August 2022 video, Appellant argues that he did not challenge that the 10 August 2022 video showed Appellant's face and shoes. However, whether or not Appellant challenged the identification, the Government nevertheless still had to prove that Appellant filmed the 10 August 2022 video of SSgt ZP in the shower. As the military judge correctly noted, "[Appellant's] identity is a fact of consequence in this case," and offering the 8 August 2022 video "to show distinctive shoes" of the perpetrator was relevant. This video confirmed Appellant's identity and was not cumulative.

Next, Appellant argues that the "videos from 10 August 2022 speak for themselves on intent," and that "[e]vidence of a common scheme or plan to do exactly what the videos showed him doing on 10 August 2022 was unnecessary." (App. Br. at 32.) Here, in saying the video "speaks for themselves on intent," Appellant seemingly admits that he filmed 10 August 2022 video with the explicit intent of filming an unsuspecting individual naked in a shower.

While the Government appreciates this concession now on appeal, Appellant made no such concession at trial. In fact, Appellant pled "not guilty" to the Additional Charge and, in his Mil. R. Evid. 404(b) motion, argued that "any intent to produce a recording on 8 August 2022 is not evidence of intent to produce a recording approximately 4 days later with respect to a different person." (App. Ex. XV at 9.) Based on this language, Appellant showed that his intent

in taking a video of someone showering naked on 10 August 2022 was very much at issue at trial.

Thus, the military judge did not err in allowing the 8 August 2022 video into evidence to show Appellant's common scheme or plan, and this evidence was not cumulative. While this video may have further confirmed Appellant's intent in taking the 10 August 2022 video of SSgt ZP, the video was not cumulative and was necessary considering Appellant's litigation of the charge.

Notably, whether or not this evidence was cumulative is a Mil. R. Evid. 403 question under the third prong of Reynolds. In that case, this Court gives "enormous leeway" to the military judge in in balancing the probative value of the evidence against any danger of cumulativeness. *See, e.g.*, Baldwin, 54 M.J. at 557.

Further, even if the video was cumulative, Appellant has failed to show any prejudice. In fact, Appellants' argument here – essentially that the 10 August 2022 video itself was enough to convict him since it "sp[oke] for themselves on intent" – severely undercuts any prejudice argument as it shows the overwhelmingly strength of the government's case and the extreme weakness of Appellant's case.[9] Moreover, as the military judge noted throughout his ruling, Appellant's trial was before a military judge alone where there were was no danger in confusing the issues or misleading the members. This is because a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . ." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000)). Thus, there was no chance that the military judge would use the evidence for an improper purpose, such as propensity.

[9] Appellant notably raises no factual or legal sufficiency argument regarding the Additional Charge to this Court.

Next, Appellant renews the same claim he made at trial, arguing, "Nothing about the 4 August 2022 video and pictures or the accumulation of pictures of feet demonstrates anything other than an interest in feet," and that "[n]one of the photos or videos of feet involve touching or assault the individuals." (R. at 33.) Appellant continues, "The 4 August video and pictures show [Appellant's] interest in filming feet from outside of a room," and "in no way indicate [Appellant's] intent to break into a room with the intent to assault an individual." (Id.) Appellant is again mistaken.

The military judge's ruling discounts each of these arguments, and Appellant fails here to explain how or why the military judge abused his discretion in denying Appellant's motion. For the 4 August 2022 video, the military judge explained how Appellant's recording showed his preparation and intent for the 12 August incident – namely it was taken only a few days before the incident, at night, and at what appeared to be a lodging facility. Moreover, the video focused on an unsuspected individual and that individual's feet, which would eventually be the focus of Appellant's assault on Mr. DF (as well as numerous pictures taken by Appellant of Mr. DF's feet prior to Mr. DF waking up).

Besides a generalized statement that the video did not indicate intent, Appellant makes no attempt to counter the military judge's conclusion that a factfinder could determine this evidence tended to show Appellant was preparing for the 12 August 2022 incident by "creeping around a lodging facility at night," and that "peering in windows could be viewed as testing the waters and increase [Appellant's] confidence that he would not be discovered, even if he went a step further and actually entered a dwelling place." (App. Ex. XXII at 12.)

Likewise, Appellant fails to detail any specific fault with the military judge's findings regarding the photos and videos found on Appellant's phone. Here, the photos and videos

clearly established Appellant's interest in feet and, as the military judge held, could have led a factfinder to believe Appellant "had the motive to enter [Mr. DF's] room and touch his feet," as well as "driven him to commit the offense charged in Charge III." (App. Ex. XXII at 14.) While Appellant appears to view these items in a vacuum because they did not show an actual assault or break-in, Appellant fails to grasp how these items show his intent and preparation to get closer to his victims, and take pictures of and touch their feet.

As to prejudice, again, this trial was before a military judge alone who is presumed to know the law, apply it correctly, and filter out inadmissible evidence. *See* Robbins, 52 at 457. Moreover, the military judge here placed severe restrictions on the evidence in question. For the 4 August 2022 media, while the Government originally provided notice of 5 recordings and 15 photos, the military judge only allowed to Government to admit one of the videos and none of the photos. As to the hundreds of photos and videos found on Appellants' phone, the military judge did not allow the Government to introduce of the actual photos or videos at all, but instead only allowed the Government to present "testimony generally describing the timing, quantity, and nature of the photos and recordings found on [Appellant's] cell phone." This restriction was done specifically to reduce any undue prejudice under Mil. R. Evid. 403. Moreover, as Appellant points out, the military judge acquitted Appellant of the charged Article 129, UCMJ, burglary offense and convicted him only of the lesser included unlawful entry offense, which shows that the military judge did not use this evidence for an improper purpose or in a way that prejudiced Appellant.

In short, Appellant has failed to show the military judge committed a clear abuse of discretion in this case. The military judge properly conducted a thorough Reynolds test on each piece of evidence, as well as the evidence overall. This also included a thorough Mil. R. Evid.

403 balancing test. Finally, Appellant has failed to show he was prejudiced. Therefore, this Court should deny Appellant's claims and affirm the findings and sentence in this case.

IV.

APPELLANT'S CONVICTION FOR TOUCHING MR. DF'S FOOT IS FACTUALLY SUFFICIENT.

Standard of Review

While this Court has not yet determined a clear standard of review for issues of factual sufficiency under the amended Article 66(d)(1), UCMJ, this Court has agreed that Congress intended this new statutory standard to "make [] it more difficult to [an appellant] to prevail on appeal."[10] *See* United States v. Csiti, ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 April 2024) (*quoting* United States v. Scott, 83 M.J. 778, 780 (A. Ct. Crim. App. 27 Oct. 2023).

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ:

> (B) Factual sufficiency review
>
> > (i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> >
> > (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
> >
> > > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > >
> > > (II) appropriate deference to findings of fact entered into the record by the military judge.

[10] While one of the specifications at Appellant's court-martial included a charging timeframe prior to 1 January 2021, all specifications that resulted in a conviction occurred after 1 January 2021.

> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

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

Pending before the Court of Appeals for the Armed Forces (CAAF) is the impact of the new Article 66 on this Courts' review of factual sufficiency. That is, they have granted review of the issue of whether, as the Navy-Marine Court of Criminal Appeals (NMCCA) held, there is a rebuttable presumption of guilt on appeal:

> We find that the revised statute requires a departure from the prior practice, and the standard for factual sufficiency has become harder for an appellant to meet. It is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. Thus, Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty.

United States v. Harvey, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 23 May 2023), rev. granted, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). *But see* Scott, 83 M.J. at 780-81 (rejecting Harvey's creation of rebuttable presumption of guilt on appeal).

This Court, in Csiti, declined to apply Harvey's rebuttable presumption standard just as the Army Court of Criminal Appeals did in Scott. However, this Court did "agree with our CCA counterparts to the extent that Congress intended this new statutory standard to "make it more difficult for [an appellant] to prevail on appeal." Csiti, at *21 (*quoting* Scott, 83 M.J. at 780;

Harvey, 83 M.J. at 693 ("[T]his [c]ourt will weigh the evidence in a deferential manner to the result at trial.")

This Court also agreed with Harvey in that the "specific showing of a deficiency of proof" provision "does not require Appellant to demonstrate the entire absence of evidence supporting an element of the offense, a requirement which would be redundant with legal sufficiency review," but rather, "the statute requires Appellant 'identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.'" Csiti, at *18 (*citing* Harvey, 83 M.J. at 691).

Though the new language states that after an appellant makes this showing a CCA "may consider whether the finding is correct in fact," this Court declined to decide whether it might properly decline to proceed further with a factual sufficiency analysis. Id., at *18-19.

As to the "weighing the evidence and determining controverted questions of fact" provision, this Court noted the term "appropriate deference" was not defined, but broadly agreed with the NMCCA that "appropriate deference" is a "more deferential standard than 'recognizing,'[11] but not one which deprives the CCA of the power to determine the credibility of witnesses." Id. at *19-20 (*quoting* Harvey, 83 M.J. at 692). This Court added that the significance of the credibility of particular witnesses or testimony will vary depending on the circumstances of the case. Id.

Regarding the "Clearly convinced that the finding of guilty was against the weight of the evidence" provision, this Court inferred that "Congress intended the beyond a reasonable doubt

[11] The prior version of Article 66(d)(1) required CCAs to "recognize that the trial court saw and heard the witnesses."

standard to continue to apply in questions of factual sufficiency," but also recognized that "Congress has overlaid the requirement that the CCA be 'clearly convinced' the evidence is insufficient before granting relief." Id. at *22. This Court then held that "in order to set aside a finding of guilty, we must not only find the weight of the evidence does not support the conviction; we must be clearly convinced this is the case," adding, "Put another way, in order to set aside a finding of guilty we must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." Id. at *22-23.

Analysis

The military judge at Appellant's court-martial correctly found Appellant guilty of touching Mr. DF's foot, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the military judge with ample evidence to convince him of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the weight of the evidence does not support Appellant's conviction beyond a reasonable doubt.

As detailed above, Appellant unlawfully entered Mr. DF's TLF room, went into his bedroom, and, for a period of around 40 minutes, took pictures of Mr. DF's feet while Mr. DF slept. (*See* Pros. Ex. 12.) Mr. DF was then awoken by "a rhythm or massage on my foot around my left toes." (R. at 358.) Mr. DF continued, "It felt like there was a circular motion. That was, like, massaging on the top of my left foot or near my toes," adding, "It felt like it was someone's hand rubbing, more specifically, fingers on top of my foot." (Id.) A1C RT also testified that Mr.

DF told her that something touched his foot and that is when Mr. DF realized that someone was in the room with him. (R. at 420.) Considering this testimony, Appellant's conviction is factually sufficient.

Yet, despite this testimony from Mr. DF, Appellant claims it is not enough because "[Mr.] DF's testimony was unreliable and wrought with serious credibility issues." (App. Br. at 36.) Appellant first claims, "At the time of the alleged touching, [Mr.] DF was in a deep sleep and 'groggy.'" (Id., *citing* R. at 355.) However, on that page of the transcript, Mr. DF was testifying about the first time he woke up and felt something touching his buttocks, not the second time he woke up to someone touching his feet.

For the second time he was awoken (this time due to his feet being touched), Mr. DF explained how he actually waited to react to the touching because he realized an intruder was in the room and needed to form a plan before doing anything. (R. at 358.) This testimony shows he was neither "groggy" nor in a deep sleep at this point. Moreover, Appellant's own counsel clarified this point on cross-examination when Appellant's counsel asked about Mr. DF's cognitive awareness when he jumped out of bed and turned the light on, which would have been when Mr. DF was awoken due to his feet being touched. (R. at 407.) Mr. DF responded, "I was more cognitively aware in the situation then whenever my anus was initially touched." (Id.) Appellant's counsel then clarified more by asking, "And it was as much as three seconds from when you felt the foot to when you get out of the bed, correct," to which Mr. DF responded, "Around that time, approximately." (Id.) Here, Mr. DF was not in a deep sleep or "groggy" when Appellant was touching his feet.

Next, Appellant attacks Mr. DF's testimony regarding his buttocks being touched, saying it was "exaggerated" and "contradictory." (App. Br. at 36.) However, a review of Mr. DF's

testimony shows no contradiction or exaggeration but instead reveals how Mr. DF, when he was awoken the first time, initially thought that a bug or the fan had caused him to feel something on his buttocks. Notably, at that point, he also did not realize someone was in his TLF room. Then, as Mr. DF explained, he realized that something more had happened, especially when he noticed that his anus was sore for a few days after the incident. Here, this was no exaggeration or contradictory testimony, but rather Mr. DF explaining how he came to realize what happened to him.

Next, Appellant does exactly what he did to Mr. DF at trial – attempt to turn himself into the victim and Mr. DF into the criminal. However, in the early morning hours of 12 August 2022, Mr. DF was simply sleeping in his TLF room having freshly arrived at Aviano AB. In contrast, Appellant dressed himself in all black – black shirt, black beanie, and even a black mask. Appellant unlawfully entered Mr. DF's TLF room. Appellant went into Mr. DF's bedroom in the total darkness. For the next 40 minutes, Appellant took photos of Mr. DF's feet while Mr. DF slept. At some point, Appellant took his pants off. And then, Appellant touched Mr. DF's feet while Mr. DF slept, again, in the total darkness while dressed all in black.

Here, Appellant could have chosen to not unlawfully enter Mr. DF's room, not dress in all black, not take pictures of Mr. DF's feet while he slept, and not touch Mr. DF's feet. Yet, Appellant willfully chose otherwise, instead choosing to engage in criminal behavior and commit multiple crimes.

But yet, somehow, Appellant claims to be the victim. Appellant's claim here is the equivalent of an arsonist who sets fire to a building and then complains of getting burnt. Here, when Mr. DF awoke from his sleep in *his* TLF room in a foreign country, Mr. DF found a tall man dressed all in black in his bedroom. Understandably fearing for his life (aside from a man

dressed in all black, Mr. DF also did not know who the person was or what intentions he had), Mr. DF rightfully defended himself.

Yet, even in this traumatic moment, Mr. DF showed tremendous restraint when he stopped punching Appellant as soon as Appellant stated he was not going to resist. (R. at 364.) Mr. DF then walked Appellant out into the hallway and, if Appellant had simply complied with Mr. DF and waited for law enforcement to arrive, would have encountered no further physical interaction with Mr. DF.

However, again, Appellant chose criminal behavior by attempting to flee into Mr. DF's room – the very scene of Appellant's crimes. Again, Appellant's own willful actions forced Mr. DF to act in order to protect himself. And while Mr. DF did put Appellant in a choke hold, Mr. DF continually told Appellant he would let go of the hold if Appellant would stop resisting, but Appellant continued to knock things around. When Appellant finally stopped resisting, Mr. DF immediately released the hold. Notably, when Security Forces arrived just a short time later, A1C RT testified that Appellant was not having any trouble speaking or struggling to breathe. (R. at 422.)

Here, Mr. DF was perfectly justified in his actions of confronting and subduing an unknown intruder who was dressed all in black who had unlawfully entered his TLF room in the total darkness of night. As Mr. DF testified, there was a "masked man" in his room, he feared for his life, and all of Mr. DF's actions were in direct response to Appellant's own willful and deliberate criminal behavior. His actions were not "excessive" as Appellant claims and certainly did not serve as any "motivation to change his story." (*See* App. Br. at 37.) Mr. DF's actions were justified under the circumstances and gave the military judge no reason to doubt his credibility. This Court should similarly find no reason to doubt Mr. DF's credibility.

Here, Appellant has failed to make a specific showing of a deficiency of proof as to his assault conviction. Even if he did, the evidence shows Appellant assaulted Mr. DF by unlawfully touching Mr. DF's feet. When providing the military judge the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing Mr. DF testify, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

V.

APPELLANT IS ENTITLED TO NO RELIEF FOR ANY POST-TRIAL DELAY IN THIS CASE.

Additional Facts

Appellant was sentenced at his court-martial on 2 May 2023. Appellant's case was docketed with this Honorable Court on 14 November 2023, 196 days later. Appellant never asserted a right to speedy post-trial processing during this time.

On appeal, Appellant's counsel submitted six enlargement of time motions. In his sixth motion, Appellant's counsel wrote, "Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time." (App. Mot., dated 15 July 2024.)

When Appellant filed his Assignments of Error brief on 25 July 2024, 255 days (over eight months) had elapsed since the case was docketed with this Court.

Standard of Review

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

Law

When evaluating post-trial constitutional due process complaints of delay, our superior Court has adopted the Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972). Moreno, 63 M.J. at 135. The four factors set forth in Barker are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (*citing* Barker, 407 U.S. at 530). All of these factors are to be considered together with the relevant circumstances in the case. Id. at 136.

In Moreno, our superior Court established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633.

This Court now applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id.

Absent a showing of prejudice, a due process violation warranting relief only occurs when, "in balancing the other three factors [for analyzing post-trial delays], the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and

integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

In United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), our superior Court determined that an appellant may be entitled to relief pursuant to a Court of Criminal Appeals Article 66(d) power "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. at 224. Post-trial delay does not require that relief be given under these circumstances; rather, appellate courts are cautioned to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Additionally, this Court is guided by the following factors, with no single factor being dispositive:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Keeping in mind that our goal under Tardif is not to analyze for prejudice, whether there is nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and
>
> (6) Given the passage of time, whether this court can provide meaningful relief in this particular situation.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). Relief under Article 66(d), UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Tardif, 57 M.J. at 225.

Analysis

The circumstances of this case do not warrant relief. For the reasons set forth below, Appellant's claim should be denied.

a. Moreno Analysis

The first factor, the length of delay, weighs slightly in Appellant's favor since this case exceeded the Livak standard of sentence to docketing by 46 days. While considered facially unreasonable, the circumstances of this case do not warrant relief. Additionally, our superior Court has not awarded relief even when the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

The second factor, the reasons for delay, also weighs slightly in the Appellant's favor. A review of the timeline of Appellant's post-trial processing shows 109 days of the 196-day timeframe was filled by transcribing the record from 2 May 2023 until 19 August 2023. (ROT, Vol. 4.) The court reporter's chronology shows the court reporter had multiple week-long trials during this timeframe. Still, the court reporter attempted to mitigate the delay by assigning portions of Appellant's transcription to another court reporter. The chronology also shows the transcript was sent to counsel multiple times for revision. The 605-page transcript was certified by Appellant's defense counsel on 19 August 2023, 10 days after the Government trial counsel

certified on 9 August 2023. Appellant provides no explanation as to why his counsel took 10 extra days to certify the transcript.

After Appellant's counsel certified the transcript on 19 August 2023, TSgt RP's declaration shows Appellant's record was continually worked throughout the end of August and September upon once the transcript was complete. Notably, TSgt RP's declaration discusses issues found during Third Air Force's review of the ROT in late September that required corrections, which took place during the first half of October 2023. Finally, while the case was not docketed with this Court until 14 November 2023 (Day 196), TSgt RP's declaration shows the base office mailed the ROT to JAJM 21 days earlier, on 24 October 2023 (Day 175). While this 24 October 2023 date still exceeds the 150-day Livak standard, the standard was exceeded by just 25 days when the base office completed their portion of post-trial processing of this case by sending the ROT to JAJM.

Simply put, post-trial processing of Appellant's case did not languish after his trial. Instead, as shown by both the court reporter's chronology and TSgt RP's declaration, Appellant's case was worked on a consistent basis throughout the timeframe from Appellant's sentencing to this Court's docketing. The third factor, whether Appellant asserted his right to speedy post-trial processing, weighs heavily in the Government's favor. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (*quoting* Barker, 407 U.S. at 528).

As he concedes in his brief, Appellant asserted his right to timely appellate review for the first time on 25 July 2024 when he filed his brief with this Court. Appellant never asserted this right during the 196 days between his sentence and this Court's docketing, and never asserted it during the 255 days in which his counsel was preparing to file his brief to this Court. Further, while Appellant' brief states these delays were "no fault of [Appellant]," Appellant fails to highlight that he had been advised of his right to a timely appeal and still specifically agreed to six enlargements of time totaling 255 days.

Regarding prejudice because of this delay, our superior Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Notably, Appellant provided this Court no declaration addressing any alleged prejudice he has faced. Further, within his brief, Appellant offers no individualized bases for prejudice. He makes no claim of oppressive incarceration pending appeal nor does he claim any undue anxiety or concern. Instead, citing Moreno, Appellant generally states that he faced "impairment of [his] grounds for appeal," but he was unable to petition this Court for relief sooner." (App. Br. at 41, *citing* Moreno 63 M.J. at 138-39.) Yet, Appellant fails to state how the 46-days in excess of the Moreno standard rendered him "unable to petition this Court," what type of petition he has been unable to file, or how his ability to exercise his post-trial rights have been impeded. If Appellant is referencing his current brief, Appellant again fails to account for his own 255-day

delay in filing his brief or the six enlargements of time he requested from this Court. Further, considering his lengthy brief with multiple issues raised, Appellant has failed to show any impairment to his grounds for appeal.

All told, Appellant has faced no prejudice due to the delay between his sentencing and docketing with this Court. Thus, Appellant's Moreno claim for relief should be denied.

As to relief pursuant to Toohey, our superior Court held that a delay of 481 days between sentencing and convening authority action was "not severe enough to taint public perception of the military justice system," adding that it did not involve the years of post-trial delay seen in Moreno and Toohey.[12] *See* Anderson, 82 M.J. at 86. The reasons for delay in that case included delays in "creating the transcript or authenticating the record of trial." Id. at 86-87. Notably in Anderson, the appellant made three speedy trial requests to the Chief of Justice, but "there was no indication that [the Chief of Justice] took any steps to speed the process beyond confirming that the military judge had the record." Additionally, the military judge in that case took 298 days to authenticate the record. Id.

Despite the appellant's repeated assertion of his speedy trial rights and the 481-day delay, our superior Court still granted no Toohey relief because there "is no indication of bad faith on the part of any of the Government actors," and "no indication of prejudice." Id. at 88. The Court continued, "Though we cannot condone the military judge's unsubstantiated delay in authenticating a fairly straightforward trial record, we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity." Id.

[12] Toohey involved a six-year delay from the end of the appellant's trial to the lower court issuing a decision. Toohey, 63 M.J. at 362.

The same can be said in this case. Here, there is no indication of bad faith on the part of any Government actor and there is no indication of prejudice. Further, the delay in this case, 196 total days, is over 275 days less than the delay in Anderson. Using our superior Court's reasoning and basis for not granting Toohey relief in Anderson, this Court should likewise grant Appellant no relief in this case.

b. Tardif Analysis

Notably, Appellant does not cite to either Tardif or Gay in his brief or ask for relief pursuant to those cases. Yet, even under Tardif and this Court's Gay factors, Appellant's case does not warrant relief for the same reasons detailed above. While this Court recently granted sentence relief pursuant to Tardif and Gay in United States v. Hennessy, ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. 20 August 2024), that case involved a sentence-to-docketing timeline of 412 days, more than two times the delay in this case. This Court should deny this assignment of error.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 26 August 2024 via electronic filing.

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26 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40537
Senior Airman (E-4) JAELEN M. JOHNSON, USAF *Appellant*.	)	Panel No. 2

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised in Appellant's Assignments of Error brief. Appellant raises a total of five issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 26 August 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF** Before Panel No. 2 No. ACM 40537 27 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 an enlargement of time (EOT) to file a Reply to the Government's answer to Appellant's Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on **3 October 2024**. The record of trial was docketed with this Court on 14 November 2023. From the date of docketing to the present date, 287 days have elapsed. On the date requested, 324 days will have elapsed.

On 1-2 May 2023, Appellant was tried by a general court-martial at Aviano Air Base, Italy. Contrary to his pleas, the military judge found Appellant guilty of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019); one charge and one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929 (2019); and one charge and one specification of indecent visual recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2019). R. at 548; Entry of Judgment (EOJ), dated 25 May 2023. The military judge sentenced Appellant to 18 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a bad conduct discharge, and a reprimand. R. at 604; EOJ. The convening authority took no action on the findings

and the sentence. Convening Authority Decision on Action – *United States v. Senior Airman Jaelen M. Johnson*, dated 17 May 2023.

The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. Appellant is not confined. Mr. Don King is lead counsel for SrA Johnson. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, counsel has been in communication with Appellant concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Capt Bruzik is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton* – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case it on its eleventh enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its eighth enlargement of time. Undersigned counsel has completed an initial review of the remanded record of trial.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution

exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its sixth enlargement of time.

Through not fault of Appellant, lead civilian counsel has several court hearings and accompanying travel dates over the next thirty days which will make it difficult to fully address the Government's answer. Mr. King will be occupied with these matters from 29-30 August 2024; and on 5, 10, 11, 13, 16-20, and 23-25 September 2024. Additionally, the Government filed a lengthy answer brief measuring in at 85 pages which take considerable effort to read through and respond to. Accordingly, an enlargement of time is necessary for counsel to fully review the Government's answer brief and reply.

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

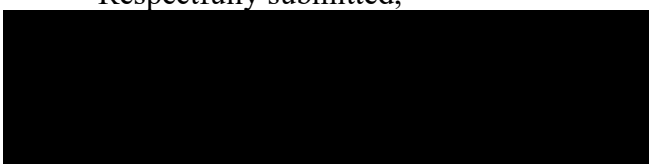
Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 August 2024.

Respectfully submitted,



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29 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), JAELEN M. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF ACM 40537 Panel No. 2

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 a reply brief. The United States objects to any enlargement of time over 7 days, because Appellant has not articulated good cause to take over 4 times the normal time allotted to file a reply brief.

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 August 2024.

JENNY A. LIABENOW, Lt Col, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40537**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jaelen M. JOHNSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 26 August 2024, the Government submitted a motion to attach post-trial declarations from TSgt RP. The Government avers that this declaration is relevant and necessary to resolve Appellant's assignment of error claiming that he is entitled to relief due to post-trial processing delay. Appellant did not oppose the motion.

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

Accordingly, it is by the court on this 3d day of September 2024,

ORDERED:

The Government's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

26 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO ATTACH DOCUMENT
v.	)	
	)	ACM 40537
Senior Airman (E-4) JAELEN M. JOHNSON, USAF *Appellant*.	)	Panel No. 2

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 submits the following document in support of the government's Answer to Appellant's Assignment of Error brief in the above referenced case:

Declaration of TSgt RP, dated 26 August 2024, 1 page.

This document provides additional information and context outside the record but are relevant and necessary for the United States to answer Appellant's brief. Specifically, TSgt RP's declaration provides this Court necessary background and context regarding Appellant's claim that he is entitled to relief due to post-trial processing delay. TSgt RP's declaration provides needed context necessary to address Appellant's claims.

Our superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Here, Appellant's claim of post-trial delay is directly raised by materials in the record. This

declaration is relevant to address Appellant's claims of prejudice due to post-trial processing delay. Thus, this Court may consider them under Jessie.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 26 August 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40537**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jaelen M. JOHNSON	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 30th day of September, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

[redacted]
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JAELEN M. JOHNSON,
Senior Airman (E-4),
United States Air Force,
Appellant.

No. ACM 40537

REPLY ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**REPLY ON BEHALF OF APPELLANT**
v.	)	Before a Special Panel
Senior Airman (E-4) **JAELEN M. JOHNSON,** United States Air Force *Appellant*.	)	No. ACM 40537 30 September 2024

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jaelen M. Johnson (Appellant) hereby files this reply to the Appellee's Answer, filed 26 August 2024 (Ans.). Appellant stands on the arguments in his brief, filed 25 July 2024 (Appellant's Br.), and in reply to the Answer, submits the additional argument for the issues listed below.

I.

THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED FROM APPELLANT'S CELL PHONES.

Additional Facts

When AP first contacted JF on 12 August 2012, it was to ask for a search authorization for the clothing SrA Johnson was wearing when he was arrested and the cell phone that was in his possession, the iPhone 7. (R. at 149, 433; App. Ex. II at 26, 37; App. Ex. XVII at 43). This authorization was based upon a verbal conversation with JF. (R. at 181.) A few days later, AP followed up with a written affidavit. (R. at 181; App. Ex. XVII at 40.) During the hearing on the motion, the Assistant Trial Counsel had the following exchange with SA AP:

Q: The affidavit and the form 1176 are two separate documents, correct?

A: Yes, sir.

Q: Was this affidavit used to support just this one 1176 or multiple?

A: Multiple 1176s, sir.

Q: So there were other 1176s with different evidence on them than the one that's at issue here at the moment?

A: Yes, sir.

(R. at 191.) Later, the Assistant Trial Counsel confirmed again: "And would that affidavit have been drafted to support—did the factual basis support for all those 1176s?" AP replied: "Yes, sir. It was just the facts in the affidavit." (R. at 193.)

On 31 August 2022, JA had taken over the investigation and had written a new affidavit. (App. Ex. XVII at 45.) The affidavit did not include any mention of the reports from Turkey of a prowler. (App. Ex. XVII at 45.) This affidavit was used to support the single search authorization used to examine both the iPhone 7 and the iPhone 13 Max for "media produced and all messages" sent and received between 29 December 2021 and 12 August 2022. (App. Ex. XVII at 48.) Although not included in the affidavit, JA did tell JF about "allegations of very similar behavior at a previous location." (R. at 152.) His understanding of the other misconduct was that "there were possible pictures taken of individuals while they were sleeping. Unauthorized entry into residences and the pattern of behavior that was presented seemed very similar to allegations from a previous base." (R. at 154.)

Upon further questioning, JF testified that he did not know the location of the other alleged misconduct. (R. at 158.) He was not told whether SrA Johnson's name had been mentioned in relation to those allegations. (R. at 158.) He was only told that there were "similar complaints." (R. at 158.) JF clarified that he signed the search authorizations "based on the fact that there were multiple phones found at the incident." (R. at 160.) He did not find probable cause based upon the allegations from another location. (R. at 160.)

Later, when the Military Judge questioned JF he could not recall if the discussion regarding the other allegations at a previous duty station was before the second or third

authorization. (R. at 165.)[1] He did know that after the second search authorization, based upon the evidence found on the phone, the allegations "mirrored allegations from a previous location where Airman Johnson had been stationed." (R. at 165.) On redirect and recross, JF reiterated that his finding of probable cause for the second search authorization came from the existence of multiple phones at the scene. (R. at 166-67; 170.) The Military Judge further clarified: "So when the information about the prior incident, when that was presented to you, it was presented generically that similar allegations had been reported at a location that the accused had been assigned?" (R. at 170.) JF responded: "Correct." (R. at 170.) The Military Judge asked: "But nobody implicated the accused in those?" (R. at 170.) JF: "That's correct." (R. at 170.)

In his ruling on the motion to suppress, the Military Judge noted that JA and JF had discussed similar allegations at a previous duty station where SrA Johnson had been stationed. (App. Ex. XX at 6-7.) In his probable cause analysis for the second search authorization, the Military Judge relied on the discussion between JA and JF concerning the episode in Incirlik to overcome the defense argument that the lengthy date range was without justification. (App. Ex. XX at 24.)

Law and Argument

A. Col JF Did Not Have the Authority to Allow the Expanded Search of SrA Johnson's iPhone 7 and iPhone 13 Max.

The Government argues that the defense has waived its argument that JF did not possess the authority to allow the expanded searches of the iPhone 7 and the iPhone 13 Max. (Ans. at 20.) SrA Johnson did not waive this issue. The Government relies heavily on an off-hand

[1] Although not challenged by the defense in this motion, a third search authorization was granted on 14 October 2022 based upon the photos and videos found in the analysis authorized by JF on 31 August 2022. (R. at 167; App. Ex. XVII at 60.) Should this Court agree that probable cause did not exist to search the phones for data beyond 12 August 2022, the results of this third authorization would similarly be suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963).

remark in the Military Judge's ruling where he explains that "the Defense appears to concede that JF was a "competent military authority." (App. Ex. XX at 21.)

However, the defense never conceded the issue, merely accepting it for the sake of argument before moving on to other issues. Specifically, the defense stated, "[a]lthough the search and seizure *may* have been authorized by an individual competent to issue the search authorization . . . ." (App. Ex. XVII at 16) (emphasis added). The defense addressing the issue in this manner, without conceding that Col JF was actually the appropriate authority to allow such a search, was sufficient to preserve the issue on appeal. The Military Judge erred by taking this to represent an affirmative waiver of any challenge to JF's status as a search authority. *See United States v. Oliver*, 76 M.J. 271, 273 (C.A.A.F. 2017) (recognizing a presumption against waiver unless there is an intentional relinquishment of a known right).

That the issue was preserved is also evident in the fact that the Military Judge made findings concerning JF's authority. (App. Ex. XX at 21.) This would not have been necessary had the defense waived the argument. His findings were incorrect in both law and fact, as the Military Judge mixed up where the two phones were found and stated that as his commander, JF had control over the person of SrA Johnson and all of his property.

Finally, the defense's treatment of JF's authority was enough to put the Government on notice that the issue was subject to litigation, therefore affording them the opportunity to develop the record. *United States v. Perkins*, 78 M.J. 381, 390 (C.A.A.F. 2019) (holding that the purpose of Mil. R. Evid. 311(d)(2)(A)'s waiver provision is to afford the Government "the opportunity to present relevant evidence that might be reviewed on appeal.") SrA Johnson should not now be penalized for the Government's decision not to present evidence on this issue.

As this issue is not waived, this Court should find that JF did not possess the authority to allow the search of SrA Johnson's iPhone 13 Max in any respect. JF did not have control

over the property found in DF's room. The iPhone 13 Max could not be proven to be SrA Johnson's property until it was analyzed. Therefore, the appropriate authority would have been the commander who had control over the temporary lodging facility.

Further, the good faith exception could not apply in this case because the office of special investigation (OSI) agents were fully aware that JF did not have the authority to grant search authorizations for all of the evidence found at the scene. AP repeatedly explained that his affidavit was used to support multiple Form 1176 search authorizations. (R. at 191, 193.) If he believed that JF possessed the authority to allow the search and seizure of all items found in the TLF room, AP would have included that information on the Form 1176 authorization he had JF sign. Instead, the authorization that AP had JF signed only allowed the search of the items physically found on SrA Johnson when he was apprehended. (App. Ex. XVII at 43.) The Government's argument that the affidavit's discussion of a search and seizure of DF's TLF room ignores that AP repeatedly testified that the affidavit he prepared was used to support more than one authorization. (Ans. at 22; R. 191, 193.) The authorization itself grants the ability to search and seize, not the affidavit. AP knew that JF had authority only over SrA Johnson's belongings found on him at apprehension, so he created multiple Form 1176 authorizations for the various search authorities but used one common affidavit to support them all. (R. at 191, 193.)

This knowledge of the limitations of JF's authority transferred to JA when he took over the case. He had the same information that AP had concerning JF's position and the location of the various items of evidence found. Most importantly, he had AP's multiple Form 1176s to reference in determining who to approach for expanded search authorization. His decision to ask JF to authorize the expanded search of the iPhone 13 Max, which was never in his control, and of the iPhone 7, which was now out of his control, was not in good faith.

B. Probable Cause Did Not Exist to Allow a Search for Media That Predated 12 August 2022.

The second search authorization allowing for the expanded search of SrA Johnson's two cell phones cannot be justified based on the mere fact that SrA Johnson had been carrying his phones with him while he was in DF's lodging room. The Military Judge's finding that probable cause existed was error. While the Military Judge agreed with the defense that the evidence related to the 12 August 2022 incident did "not provide facts sufficient to go rummaging about in [SrA Johnson's cell phones," he ultimately concluded that "if [SrA Johnson] were simply going to sneak into DF's room . . . he had no reason to take his phone, let alone two." (App. Ex. XX at 25).

But the presence of one's cell phone on their person is hardly unusual or enough to provide probable cause to search that phone. A cell phone is almost a "feature of human anatomy." *Carpenter v. United States*, 585 U.S. 296, 311 (2018) (*quoting*) *Riley v. California*, 573 U.S. 373, 385 (2014). In fact, SrA Johnson's cell phones represent a "pervasive and insistent part of daily life. . . ." *Riley*, 573 U.S. at 385. While SrA Johnson apparently did not have his wallet or keys with him, the record presents absolutely no evidence available to JF that the phones were used in any type of criminal manner.

Contrary to the Government's brief, this left JF with little more to rely on other than JA's "education, training, and experience" to suggest that SrA Johnson's ordinary possession of phones was somehow criminal. (Ans. at 29.) Indeed, the Military Judge relied on JA's background to conclude that there was a reasonable belief that SrA Johnson "deliberately took the phones and used them in the commission of the alleged crimes." (App. Ex. XX at 25.) However, this leap was not supported by the evidence of the 12 August 2022 incident. "[A] law enforcement officer's generalized profile about how people normally act in certain circumstances does not, standing alone, provide a substantial basis to find probable cause to search and seize an item in a particular case; there must be some additional showing that the

accused fit that profile or that the accused engaged in such conduct." *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). The Military Judge received no evidence to make that additional showing. The authorizing commander explained that the "request was centered on the fact that there were multiple phones found on the location . . . ." (R. at 151.) Further, there was no testimony of the requesting agent's training and experience, nor any articulation for how that training demonstrated a nexus between SrA Johnson's alleged conduct and how his phones may have been used in the commission of a crime. The Military Judge abused his discretion by drawing out such a conclusion.

Even if probable cause did exist to search SrA Johnson's cell phones based upon the fact that he carried two phones with him on 12 August 2022, JF had no basis for allowing the search of the phones for the period of 29 December 2021 to 11 August 2022. JF repeatedly testified that he had only general knowledge of allegations of similar behavior in another location. (R. at 158, 165, 170.) His decision to grant the search authorization was based entirely and exclusively on the fact that SrA Johnson took two phones with him into the TLF on 12 August 2022. (R. at 160, 166-67, 170.) The Military Judge's conclusion that the date range was explained by the conversation between JA and JF regarding these other allegations ignores JF's own testimony upon what he based his finding of probable cause. (R. 160, 166-67, 170). This was error.

Even if JF had included the information regarding the reports from Turkey in his determination of probable cause, this expanded date range would still be insufficiently supported by evidence and fact. Nothing about the reports from Turkey established that SrA Johnson was involved. (R. 200-15). There was no evidence that JA conducted any further investigation to determine whether SrA Johnson was involved or whether there was any indication that the individual in Incirlik was even carrying, let alone using, a cell phone. (R. at 212). SA JA was acting on mere conjecture that SrA Johnson was the perpetrator of this other

incident. *United States v. Cobb*, 432 F.2d 716, 719 (4th Cir. 1970) (questioning affidavit for search authorization based on "rumor and hearsay" of accused's engagement in similar criminal conduct, but without verified specific instances.) Even verified prior instances of criminal conduct cannot be used to sustain a finding of probable cause. *United States v. Melvin*, 419 F.2d 236, 141 (4th Cir. 1969).

The Government has not pointed to a single analogous case where descriptors such as provided for the incidents in Turkey were sufficient to support probable cause. Instead, the general description relied on by the Military Judge implicated an overly broad category of persons. *Reid v. Georgia*, 448 U.S. 438, 441 (1980). Numerous cases stand for the opposite conclusion. *See, United States v. Jones*, 619 F.2d 494, 497 (5th Cir. 1980) (finding that description of the perpetrator as "black male, 5 feet 6 inches to 5 feet 9 inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket" insufficient to create reasonable suspicion that accused was perpetrator); *United States v. Brown*, 448 F.3d 239, 247-48 (3d Cir. 2006) (holding that description of "African-American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running south on 22nd street, where one male was 5'8" and other was 6'" too general to create reasonable suspicion towards accused); *United States v. Rias*, 524 F.2d 118, 119121 (5th Cir. 1975) (suspects fitting description of "two black males in a black or blue Chevrolet" did not provide reasonable suspicion); *United States v. Soza*, 686 Fed. Appx. 564, 567 (11th Cir. 2017) (close proximity of accused near burglary site while matching description of "Spanish male in his forties wearing a grey shirt and baseball cap" insufficient to give probable cause to arrest.)

The information provided by SA JA on these other allegations was simply too vague to support a finding of probable cause to search SrA Johnson's phones for the expanded date range. Even JF recognized this when he based his determination of probable cause solely on SrA Johnson's possession of two cell phones. (R. at 160, 166-67, 170.) The Military Judge's

use of this information to draw his own conclusions regarding probable cause was erroneous. The information was simply too vague and without any connection to SrA Johnson's cell phones to support an expanded search of SrA Johnson's phones.

Nor can the good faith exception save this illegal search. This exception cannot apply where the individual issuing the authorization did not have a substantial basis for determining the existence of probable cause. M.R.E. 311(c)(3). JF testified that he did not use the information concerning the similar allegations in his probable cause determination. Therefore, he had no basis for allowing a search of the media on SrA Johnson's phones going back to 29 December 2021. He authorized this expanded search without probable cause and operated as a rubber stamp for the OSI agents.

The Government's discussion of the deterrence value of suppressing the evidence found during the search of SrA Johnson's phones ignores the statement by the Military Judge that the discovery of evidence on the phones proved the agents' and JF's decisions correct. (App. Ex. XX at 28). First, no evidence of SrA Johnson's involvement in any incident in Turkey was uncovered. This was the entire reason that JA wanted to search over the specific date range of 29 December 2021 to 12 August 2022. So, their decision was not proven right in that regard. Secondly, this is an inappropriate judicial basis for declining to suppress evidence. Every motion to suppress involves evidence discovered in the place where law enforcement illegally treads. If the discovery of evidence negates the illegality of the search, no motion to suppress would ever be successful.

The only way to ensure that law enforcement respects the rights of individual servicemembers to be free from searches and seizures unsupported by probable cause is to suppress the fruits of these illegal searches. In this case, the benefit of deterring agents from taking fishing expeditions through digital evidence in hopes of finding something incriminating

is greater than the cost to the justice system. The evidence from the phones that predates 12 August 2022 and all derivative evidence should be excluded.

II.

THE DELAY OF 195 DAYS BETWEEN THE IMPOSITION OF PRETRIAL RESTRAINT AND ARRAIGNMENT VIOLATED APPELLANT'S ARTICLE 10 AND R.C.M. 707 SPEEDY TRIAL RIGHTS.

A. Article 10, UCMJ.

1. *Barker* Factors One and Two.

This Court's Article 10, UCMJ, analysis is guided by the factors laid out in *Barker v. Wingo*, 407 U.S. 514, 531 (1972). Here, the Government argues that it was diligently moving towards trial in SrA Johnson's case. (Ans. at 46.) It makes this claim despite taking 77 days after the imposition of pretrial confinement to prefer charges and 195 days to arraign him. (Charge Sheet; R. at 1). To support this claim, the Government points to actions such as the base legal office becoming aware of reports of misconduct in Turkey. (Ans. at 47). The Military Judge also pointed to this event as one that caused prosecutors to pause before preferring charges. (App. Ex. XII at 23). Yet, no evidence was ever admitted showing that AFOSI or the prosecutors investigated those reports in any way.

The Government asserts that it spent the time before charges were preferred investigating other possible offenses. (Ans. at 46). Certainly, the Government is not limited to charging those offenses for which it has complete information at the time of pretrial confinement. *United States v. Cossio*. 64 M.J. 254, 256 (C.A.A.F. 2007). But where the Government has evidence of offenses committed by an accused who is in pretrial confinement, it must take immediate steps to inform him of the specific wrong of which he is accused and to try him on those charges with reasonable diligence. Article 10(b)(1), UCMJ (2019). Instead, SrA Johnson waited 77 days just to be informed of the charges against him.

Article 10, UCMJ, requires movement towards trial. Contrary to the Government's argument, the defense did not claim that prosecutors were not involved in his case until October 2022, but rather that an Assistant Trial Counsel was not assigned and a request for a Circuit Trial Counsel not made until 3 October 2022--facts established by the Government's own evidence. (App. Ex. VI at 57; R. at 57.) While members of the Legal Office may well have been assisting OSI with its investigation and preparing a draft proof analysis, the lack of detailed Trial Counsel for the first 52 days of SrA Johnson's pretrial confinement does not show reasonable diligence in moving towards trial.

The Government also takes issue with the characterization of the Government as waiting until 12 December 2022 for the defense to propose a date for the Article 32, UCMJ, hearing. (Ans. at 48.) The Government then points to the three emails the prosecutors sent asking for defense availability. (Ans. at 48.) Reasonable diligence under Article 10, UCMJ, is not satisfied by firing off three emails in a month. The responsibility to bring an accused to trial belongs to the Government and a diligent prosecutor, in the face of perceived defense avoidance, will schedule an Art. 32, especially when the accused is in pretrial confinement. Reasonable diligence for an accused who has been in pretrial confinement for 77 days requires setting a date for an Article 32, UCMJ, hearing and appointing a preliminary hearing officer. The Government argues that a hearing officer could not be assigned until a firm date for the Article 32, UCMJ, hearing was set. (Ans. at 49). Again, this answer ignores that the Government controls the hearing, the date of the hearing, and the hearing officer, who can be ordered to be at the hearing on the date it is set. Article 10 does not contemplate nor tolerate delay based upon the need to find an officer who can make room in their busy schedule to afford the accused his right. The Government provides no rationale for why a hearing officer and hearing date could not have been set by prosecutors charged with Article 10, UCMJ, responsibility to bring an accused to trial.

2. Third *Barker* Factor.

SrA Johnson requested speedy trial on two occasions. The first was the day that he was confined, on 12 August 2022. (App. Ex. XVII at 66.) The second was in February, following his Article 32, UCMJ, hearing. (App. Ex. XII at 24.) By the time the defense requested a trial date, SrA Johnson's speedy trial rights under Article 10, UCMJ, had already been violated. The logistics of coordinating the schedules of civilian defense counsel for a court-martial being tried abroad does not negate the Government's failure to exercise reasonable diligence from the time that SrA Johnson was placed into pretrial confinement and requested a speedy trial.

3. Fourth *Barker* Factor.

The Government claims that SrA Johnson faced no prejudice from the delay in getting to trial because he was able to take medication for his increased anxiety during his pretrial confinement. (Ans. at 52.) Importantly, "No single factor is dispositive, and absence of a given factor does not prevent finding a due process violation." United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022). Even so, the fact that he had to be medicated for the anxiety he experienced demonstrates that he suffered prejudice from being confined for 77 days before being told what charges he faced and another 118 before being arraigned.

The Government also claims that he cannot complain about his confinement because SrA Johnson asked his first sergeant not to contact him. (Ans. at 52.) MP stated that SrA Johnson was unhappy with how MP was handling his complaints and asked him not to contact him. (App. Ex. VII.) Far from demonstrating how well he was doing, this shows that SrA Johnson continued to have concerns regarding his financial situation and his health that were being exacerbated by confinement and that he was not receiving adequate assistance in resolving them.

Finally, the Government argues that SrA Johnson was not hampered in preparing his defense because he apparently was able to communicate with his defense attorneys. (Ans. at

53). However, being able to make phone calls to attorneys regarding conditions of pretrial confinement is not the same as being able to meet with them frequently and access electronic resources in order to assist in his defense.

SrA Johnson's pretrial confinement for the lengthy time it took for the Government to charge and try him for these offenses was prejudicial.

B. R.C.M. 707.

The Government asserts that the Special Court-Martial Convening Authority properly excluded the two periods from 11 October 2022 until 6 November 2022 and from 7 November 2022 to 28 December 2022. (Ans. at 54.) In particular, the Government claims that the first period was excluded because the trial counsel learned of the 10 August 2022 shower video on 11 October 2022. (Ans. at 54.) The Military Judge found the same rationale persuasive in his ruling on the R.C.M. 707 motion.

What both the Military Judge and the Government ignored, however, is that the Government was not ready to proceed with the original charges on 11 October 2022, only pausing in order to "dig deeper" into the newly discovered video. According to the Government's timeline, the prosecutors learned of the new video on 11 October 2022. (Ans. at 39.) Yet the legal office sent its "final draft charges" to the NAF for review on 13 October 2022. (Ans. at 39.) The office discussed DF's participation with his victim's counsel on 18 October 2022. (Ans. at 39.) The trial counsel identified an additional charge, presumably the offense stemming from the 10 August 2022 video, on 20 October 2022. (Ans. at 39.) The Digital Forensics Report was published on 26 October 2022. (Ans. at 39.) The legal office had been looking through the photos and videos since at least 12 September 2022. (Ans. at 39.) Although the Aviano Fitness Center provided its records and they were narrowed down to 27 potential individuals on 26 October 2022, the Government preferred the original charges on 28 October 2022. (Ans. at 39.) Along with the preferral, the trial counsel advised the defense

counsel that the Government would be ready for an Article 32, UCMJ, hearing on 7 November 2022.

This timeline establishes that the Government was not ready to charge and try SrA Johnson on 11 October 2022. The discovery of the 10 August 2022 video did not cause the delay from 11 October 2022 until 6 November 2022. The investigation into that video was conducted tangentially to the original investigation, on its own slow timeline that did not result in the Additional Charge until 20 January 2023. (Ans. at 40.) The exclusion of this period was done only to save the Government from dismissal under R.C.M. 707, not because this period reflected an actual pause in progress in order to investigate a new offense. The Military Judge found the excluded timeframe reasonable because the Government did not even ask to exclude the entire time it took to identify ZP. (App. Ex. XII at 12). However, the fact that the Government ended the excluded period before it finished its investigation of the 10 August video demonstrates precisely the opposite. The 11 October 2022 discovery gave the Government an excuse to exclude some time they were primarily using to process the original charges when it realized it had exceeded the 120-day clock. This scenario is precisely why *post hoc* requests for excludable delay are viewed with considerable skepticism. *See, e.g., United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997). As with this case, these types of requests are often rationalizations for neglect or willful delay. *Id*.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE GOVERNMENT TO ADMIT PICTURES AND VIDEOS UNDER MIL. R. EVID. 404(b).

The Government argues that the Military Judge's decision to admit the 8 August 2022 video from the locker room was appropriate because the identity of the person filming was a fact of consequence in the case. (Ans. at 66.) While that may be true, this does not address the cumulative nature of this evidence. The evidence the defense did not challenge included the

video from 10 August 2022 that depicted an individual in the shower and other videos from the same day showing SrA Johnson's face and "distinctive shoes." (App. Ex. XV.) The identification of SrA Johnson wearing those shoes on another day adds nothing to the evidence found in the videos from the same day as the actual alleged offense. The Government's identification of SrA Johnson on 10 August 2022 was further established by introducing location data from his phone showing him at the fitness facility. (Pros. Ex. 14.)

The Government also disputes SrA Johnson's citation to *United States v. Wilson*, 2024 CAAF LEXIS 287 (C.A.A.F. 23 May 2024) as coming from a minority opinion. (Ans. at 66.) Yet, the principal for which it was cited is certainly well established in M.R.E. 403 and *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). Needlessly cumulative evidence has little probative value. Where that evidence is also highly prejudicial, it cannot survive the M.R.E. 403 balancing test. On identity, the 8 August 2022 video added nothing new to the Government's case. It merely confirmed that SrA Johnson wore the same shoes on 8 August and 10 August 2022.

This 8 August video was also introduced as evidence of a common plan or scheme. The Government claims that the defense argument that this evidence was unnecessary, given that the video from 10 August 2022 was already admitted, was some kind of concession of SrA Johnson's guilt or intent. (Ans. at 66.) It was no such thing. It is simply true that when the 10 August 2022 video was admitted, the "plan" or "scheme" was there for the factfinder to parse. Nothing that SrA Johnson recorded on 8 August 2022 shed any additional light on the 10 August video or added anything of substance to the Government's case. Despite the Government's arguments that the video "further confirmed Appellant's intent" in taking the 10 August 2022 video, the Military Judge did not admit the evidence to establish intent, and the offense for which SrA Johnson was being tried had no specific intent element. Manual for Courts-Martial, (2019 ed.), Part IV, para. 63.b.(2).

With little to no probative value to this 8 August 2022 video, it was easily and substantially outweighed by its prejudicial nature. The Military Judge admitted a second, uncharged instance of SrA Johnson seemingly putting a phone down in a locker room and attempting to film individuals taking showers. With so little probative value to add to the charged offense, the only thing any factfinder could glean from it is that SrA Johnson had a propensity to commit the charged offense.

The Military Judge's admission of the 4 August 2022 video and the pictures of feet found on SrA Johnson's phone introduced the same prejudicial effect. Neither of these pieces of evidence shed any additional light on the charged offenses. They served only to put salacious propensity evidence before the factfinder.

The fact that the Military Judge sat as the factfinder in this court-martial does not mitigate against the prejudicial impact of the evidence that was admitted. The Government argues that cases such as *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) establish that "there was no chance that the military judge would use the evidence for an improper purpose, such as propensity." (Ans. at 67). But *Robbins* only holds that a military judge sitting alone is entitled to a presumption the he knows the law and applies it correctly. That presumption is called into question in circumstances such as these, where the Military Judge admitted several items of evidence with minimal probative value but tremendous potential for prejudice.

IV.

THE GUILTY FINDING TO SPECIFICATION 2 OF CHARGE II FACTUALLY INSUFFICIENT.

In *United States v. Harvey*, 2024 CAAF LEXIS 502 (C.A.A.F. Sept. 6, 2024), the CAAF established the framework for factual sufficiency reviews under the amended Article 66, UCMJ (2021). To trigger such review, an appellant must first assert an assignment of error and show a specific deficiency in proof. *Harvey*, 2024 CAAF LEXIS 502 at *5. Once such a

showing has been made, an appellate court may weigh the evidence and determine disputed questions of fact. Article 66(d)(1)(B), UCMJ (2021). This review must give appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence. Id. However, this requirement does not necessarily create a higher level of deference than the previous version of Article 66, UCMJ did. *Harvey*, 2024 CAAF LEXIS 502 at *7-8. Instead, an appellate court's deference to the trial court's findings will depend on the nature of the evidence at issue. *Id*. at *8.

After weighing the evidence, if an appellate court is convinced that the finding of guilty was against the weight of the evidence, the court may dismiss, set aside, modify, or affirm a lesser finding. Article 66(d)(1)(B), UCMJ (2021). The CAAF determined that for a court to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met. *Harvey*, 2024 CAAF LEXIS 502 at *12. First, the CCA must weigh the evidence from the trial on its own, ascribing deference to the court-martial as described above, and determine that the evidence, as it has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision. *Id*.

Given the clarification provided by the CAAF, this Court should be clearly convinced that the weight of the evidence does not prove that SrA Johnson is guilty of Specification 2 of Charge II beyond a reasonable doubt. First, SrA Johnson has assigned the factual insufficiency of this guilty finding as an error. (Appellant's Br. at 34.) He has shown a specific deficiency in the proof against him. DF's testimony that his foot was being "massaged" was undermined by the lack of any physical evidence and his own "groggy state."

The Government argues that DF's "groggy state" only referred to the point at which he imagined that something had touched his anus. (Ans. at 74.) Before going to sleep, DF took melatonin. (R. at 355.) He was in a "deep sleep" and a groggy state when he first awakened.

(R. at 355.) After believing that what he had felt on his anus was a bug, DF fell back to sleep. (R. at 357.) At some time later, DF was awakened again by a feeling on his foot. (R. at 358). Nothing in his testimony indicates that he was any less asleep at this point than he was the first time he awakened. DF testified that he thought the sensation was from a sheet falling off his foot until he decided it felt like a "rhythm" and that someone was in his room. (R. at 358.) DF was still in a deep sleep, aided by melatonin, when he awoke the second time. His impression of what was happening was initially of a sheet falling from his foot. His testimony about what he felt and what caused it must be taken with his mental state in mind.

Any weighing of his testimony must also include consideration of any motive DF might have had to exaggerate his account of what occurred. SrA Johnson certainly does not raise this matter to "claim to be a victim," as argued by the Government. (Ans. at 75.) Certainly, DF was surprised by the presence of an individual in his room and was concerned for his safety. His efforts to defend himself led to him punching SrA Johnson five or six times while SrA Johnson was locked under DF's legs and not resisting. (R. at 363.) DF later placed SrA Johnson in a chokehold until SrA Johnson's body started to convulse. (R. at 370, 372, 395.) As a member of law enforcement, DF would want to avoid any hint of excessive force. His testimony concerning SrA Johnson's actions must also be weighed with this in mind.

To further seed doubt in DF's account, no physical evidence was introduced to establish any physical contact at all between SrA Johnson and DF's body, bedding, or clothing. (R. at 473.)

After conducting its own weighing of the evidence, this Court should be clearly convinced that the weight of the evidence does not support the guilty finding on this specification.

V.

SENIOR AIRMAN JOHNSON WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE

DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

The Government concedes that the second factor under the test laid out in *Barker v. Wingo*, 407 U.S. 514, 531 (1972) weighs "slightly" in Appellant's favor. (Ans. at 80.) The Government then claims that SrA Johnson's case was "worked on a consistent basis throughout the timeframe from Appellant's sentencing to this Court's docketing." (Ans. at 81.) The Government's description of the timeline does not align with the documents in the record. The court reporter's chronology states that multiple trials occurred during the time that SrA Johnson's case was being transcribed. This required another court reporter to be given portions of the case to transcribe. Even with other trials during this period, 109 days for two court reporters to transcribe a 605-page transcript is excessive. The Government also argues that the Record of Trial was being "continually worked throughout the end of August and September." (Ans. at 81.) While the Record itself was silent on such machinations, the Government has now attached a declaration from a paralegal to describe efforts that another paralegal took during this time frame. (Govt. Motion to Attach.) This declaration shows a lack of urgency in the posttrial processing of SrA Johnson's case at this point as well. The Record was mailed to 3 AF on 1 September 2023 but did not arrive until 25 September 2023. (Decl. of RP.) It took another 22 days from there to conduct the "virtual ROT party" and make corrections to the Record. (Decl. of RP.)

Further, the CAAF has previously noted that caseload management and administrative priorities are under the control of the Government. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) (citing *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003)). If the court reporters or paralegals were unable to complete their duties in the time set forth by this Court in *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), then it was the Government's responsibility to provide the resources so that they could. The second *Barker* factor should weigh heavily in favor of SrA Johnson and should lead this Court to grant

him relief pursuant to *Barker*, *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006), or *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

Conclusion

WHEREFORE, because of errors prejudicial to the appellant's substantial rights, he respectfully requests that the Court set aside and dismiss the findings of guilt to all specifications and Charges.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 September 2024.

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