IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 18 October 2023

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **28 December 2023**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 18 October 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

20 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 21 December 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 January 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, 7 and defense exhibits. The transcript is 531 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

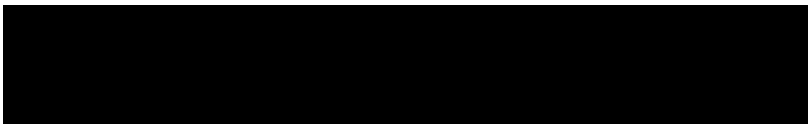
[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 21 December 2023.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 19 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 February 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, 7 and defense exhibits. The transcript is 531 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

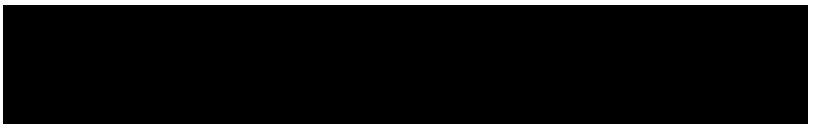
[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 19 January 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

19 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE OF COUNSEL**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 5 February 2024

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

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 12 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.

Respectfully submitted,

[redacted]

JONATHAN W. CRISP, Esq.
Civilian Defense Counsel
Pennsylvania Bar No. 83505
Crisp and Associates, LLC
4031 North Front Street
Harrisburg, PA 17110
Phone 717-412-4676
jcrisp@crisplegal.com

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 5 February 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States AiR Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 15 February 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 March 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, 7 and defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 19 cases; 15 cases are pending initial AOEs before this Court. The following cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel filed an assignment of errors brief on 7 February 2024. The Government's answer is due on 8 March 2024, with any reply being due on 15 March 2024.
2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned counsel has begun his review of the unsealed transcript and exhibits. Today, 15 February 2024, undersigned counsel completed his review of sealed materials in the record. Civilian co-counsel has completed his review of the record, has identified potential issues, and has begun research and drafting.
3) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel has completed his review of the record. This appellant does not intend to raise any issues before this Court, and undersigned counsel anticipates a forthcoming motion to withdraw.

4) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has not completed a review of the record, but has identified at least two potential issues.

5) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages. Undersigned counsel has completed an initial review of the record.

6) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages.

7) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages.

8) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages.

9) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages.

In addition, civilian co-counsel has several trial matters which take priority over this case, to include:

(1) *United States v. Andrada* – Trial at Fort Stewart, Georgia. Trial began on 15 February 2024 and will likely continue into next week.

(2) *United States v. Nester* – This is a federal case stemming from the events on 6 January 2021 in Washington, D.C. It is scheduled for 4-8 March 2024.

(3) *Commonwealth v. Larosa* – Trial is scheduled for 11-15 March 2024 in Pennsylvania.

(4) *Commonwealth v. Singer* – Trial is scheduled for 18-22 March 2024 in Pennsylvania.

(5) *United States v. Harmon* – Trial is scheduled for 8-12 April 2024 at Schofield Barracks, Hawaii.

(6) *United States v. Lindsay* – Trial is scheduled for 22-26 April 2024.

(7) *United States v. Lowery* – Trial is scheduled for 13-17 May 2024 in Charleston, SC.

(8) *United States v. Bettes* – Trial is scheduled for 31 May – 7 June 2024 at Ramstein Air Base, Germany.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 15 February 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

20 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 15 March 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 April 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 198 days have elapsed. On the date requested, 240 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, 7 and defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 17 cases; 13 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned counsel is presently working with civilian co-counsel in drafting a petition for grant of review and corresponding supplement.

The following cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel filed appellant's reply brief today, 15 March 2024. This appellant is currently confined.
2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned and civilian counsel have completed their review of the record and have begun research and drafting of potential assignment of errors. This appellant is not currently confined.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the record and identified several potential issues.
4) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages. Undersigned and civilian counsel have reviewed the record, identified

several potential issues, and begun research on those issues. This appellant is not currently confined.

5) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. This appellant is confined.

6) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. This appellant is confined.

7) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not confined.

8) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is currently confined.

In addition, civilian co-counsel has several trial matters which take priority over this case, to include:

(1) *Commonwealth v. Singer* – Trial is scheduled for 18-22 March 2024 in Pennsylvania.

(2) *United States v. Harmon* – Trial is scheduled for 8-12 April 2024 at Schofield Barracks, Hawaii.

(3) *United States v. Lindsay* – Trial is scheduled for 22-26 April 2024.

(4) *United States v. Lowery* – Trial is scheduled for 13-17 May 2024 in Charleston, SC.

(5) *United States v. Bettes* – Trial is scheduled for 31 May – 7 June 2024 at Ramstein Air Base, Germany.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 15 March 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

19 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40511**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Cassius A. MORENO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 17 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Sixth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Sixth) is **GRANTED**. Appellant shall file any assignments of error not later than **26 May 2024**.

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

Appellant's counsel should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (SIXTH)**
	)	
v.	)	Before Panel 1
	)	
Senior Airman (E-4)	)	No. ACM 40511
CASSIUS A. MORENO,	)	
United States Air Force	)	17 April 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 May 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 18 cases; 13 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned counsel is presently working with civilian co-counsel in drafting a petition for grant of review and corresponding supplement.

The following cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Oral argument is scheduled for 24 April 2024 and undersigned counsel is presently preparing for that argument. This appellant is confined.
2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned and civilian co-counsel filed the initial AOE, with the Government's reply due on 6 May 2024. Any reply brief will be due on 13 May 2024. This appellant is not currently confined.
3) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel has completed his initial review of the record and has begun research on potential AOEs. This appellant is confined.

4) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 Appeal. The Government's initial brief is due on 6 May 2024, with this appellee's answer being due on 27 May 2024. Undersigned counsel will begin reviewing the record imminently.

5) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the record and identified several potential issues. This appellant is confined.

6) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. This appellant is confined.

7) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not confined.

8) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is currently confined.

In addition, civilian co-counsel has several trial matters which take priority over this case, to include:

(1) *United States v. Lindsay* – Trial is scheduled for 22-26 April 2024.

(2) *United States v. Lowery* – Trial is scheduled for 13-17 May 2024 in Charleston, SC.

(3) *United States v. Bettes* – Trial is scheduled for 31 May – 7 June 2024 at Ramstein Air Base, Germany.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 17 April 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

19 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME(SEVENTH)**
	)	
v.	)	Before Panel 1
	)	
Senior Airman (E-4)	)	No. ACM 40511
CASSIUS A. MORENO,	)	
United States Air Force	)	14 May 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 June 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 23 cases; 16 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned counsel is presently working with civilian co-counsel, conducting research in preparation of drafting a supplement to their petition.

The following cases before this Court have priority over the instant case:

1) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel filed an assignment of error on 13 May 2024. The Government's answer is due on 12 June 2024, with any reply being due on 19 June 2024. This appellant is confined.
2) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 Appeal. The Government filed their initial brief on 6 May 2024. This appellee's answer is due on 28 May 2024. Undersigned counsel has completed a review of the record and is conducting research in preparation of drafting appellee's answer.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the record and identified several potential issues. This appellant is confined.

4) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. This appellant is confined.

5) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not confined.

6) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is currently confined.

In addition, civilian co-counsel has several trial matters which take priority over this case, to include:

(1) *United States v. Lowery* – Trial is scheduled for 13-17 May 2024 in Charleston, SC.

(2) *United States v. Bettes* – Trial is scheduled for 31 May – 7 June 2024 at Ramstein Air Base, Germany.

Undersigned counsel has been unable to contact Appellant to provide him an update on his case for this enlargement of time. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 May 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

15 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

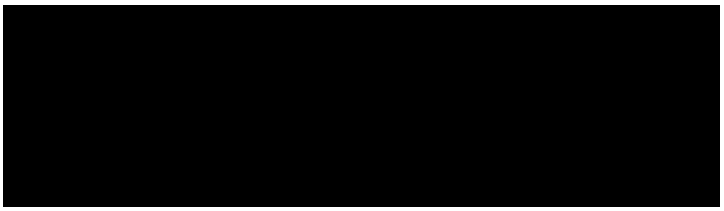
UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

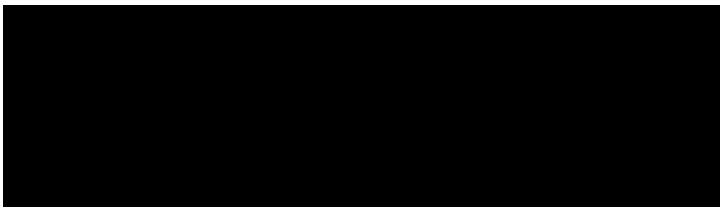
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 17 June 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 July 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 292 days have elapsed. On the date requested, 330 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 25 cases; 19 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel is presently conducting research in preparation to submit a petition and corresponding supplement to the CAAF, which is due on 1 August 2024.

The following cases before this Court have priority over the instant case:

1) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. The Government filed their answer on 12 June 2024. Undersigned counsel is presently drafting a reply to that answer. This appellant is presently confined.
2) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 Appeal. The Government filed their initial brief on 6 May 2024. This appellee's answer is due on 28 May 2024. The Government filed their reply on 5 June 2024 along with a motion for oral argument. Should this Court grant that motion, preparation for oral argument would take priority over this case.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has reviewed the sealed exhibits, portions of the unsealed record, and has conducted research on several identified issues. This appellant is presently confined.

4) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun a review of the record and identified several issues. This appellant is presently confined.

5) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not confined.

6) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is presently confined.

In addition, civilian co-counsel has several trial matters which take priority over this case, to include the following scheduled trials:

1) *United States v. Bernard Johnson*, 1:19-CR-356 – Trial on counts 1-4 is scheduled from 24-27 June 2024.

2) *United States v. Bernard Johnson*, 1:19-CR-356 – Trial on Counts 5-7 scheduled from 8-12 July 2024.

3) *Commonwealth v. Singer*, CP-38-CR818-2023 –Trial scheduled for the week of 22 July 2024.

Undersigned counsel have not contacted Appellant to provide him an update on the status of undersigned counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a

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

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

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

Respectfully submitted,

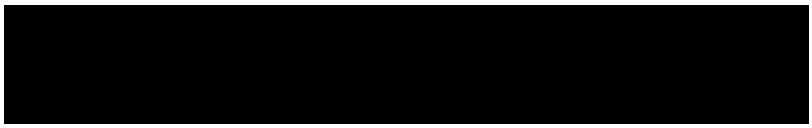
[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 17 June 2024.

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

17 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

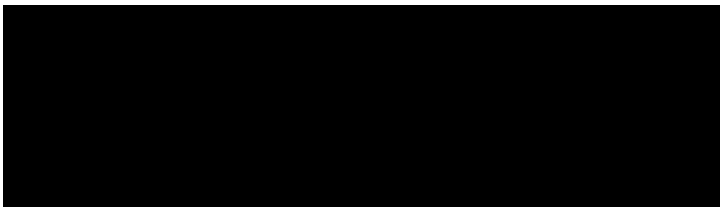
The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days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

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

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

CERTIFICATE OF FILING AND SERVICE

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



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 16 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 his ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 August 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 23 cases; 18 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel has begun conducting research in preparation to submit a petition and corresponding supplement to the CAAF, which is due on 1 August 2024.

The following cases before this Court have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel is drafting an assignment of errors brief, which his due on 18 July 2024. This appellant is not confined.
2) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. Undersigned counsel has completed a review of the unsealed record. Today, 15 July 2024, undersigned counsel submitted a consent motion to review sealed materials. Undersigned counsel anticipates filing an initial brief with this Court by the end of July 2024. This appellant is presently confined.
3) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun a review of the unsealed record. Today 15 July 2024, undersigned counsel filed a consent motion to view sealed materials. This appellant is presently confined.

4) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has completed an initial review of the record. This appellant is not confined.

In addition, civilian co-counsel has several trial matters which take priority over this case, to include the following scheduled trials:

1) *Commonwealth v. Singer*, CP-38-CR818-2023 –Trial scheduled for the week of 22 July 2024.
2) *United States v. Sciaretta* – Trial scheduled for one and a half weeks beginning on 19 August 2024.
3) *United States v. Jose Zaragoza* – Trial scheduled for one week beginning on 3 September 2024.

Undersigned counsel have not contacted Appellant to provide him an update on the status of undersigned counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 16 July 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

17 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process, but civilian defense counsel began reviewing the transcript.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 16 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 September 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 390 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. Two cases before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino* and *United States v. Daughma*. Undersigned counsel has begun conducting research in preparation to submit a supplement to the CAAF for *United States v. Valentin-Andino*, which is due on 27 August 2024.

The following cases before this Court have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. The Government filed their Answer yesterday, 15 August 2024, with any reply due on 22 August 2024.
2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun a review of the unsealed record. Undersigned counsel filed an initial assignment of errors brief on 13 August 2024; the Government's answer will be due on 12 September 2024, with any reply being due on 19 September 2024.
3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has completed an initial review of the record. This appellant is not confined.

In addition, civilian co-counsel has several appellate and trial matters which take priority over this case, to include the following scheduled trials:

1) *United States v. Bonds*, CP-38-CR818-2023 – This is a Third Circuit case, with a brief due in 20 days.
2) *United States v. Goins* – This is a court-martial case out of Fort Riley, Kansas, scheduled for mid-September 2024.
3) *Daughpin Court of Common Pleas Case* – This is a trial in Pennsylvania, scheduled for the end of September 2024.

Undersigned counsel have not contacted Appellant to provide him an update on the status of undersigned counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to requests for enlargement of time.

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

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 16 August 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

19 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process, but civilian defense counsel began reviewing the transcript.

Moreover, Appellant should be required to personally state his agreement or lack thereof to this specific delay. *See* United States v. Moreno, 63 M.J. 129. 137 (C.A.A.F. 2006)("There is no evidence in this case that the numerous requests for delay filed by appellate defense counsel benefited Moreno or that Moreno was consulted about and agreed to these delays.")

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 13 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 October 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Record of Trail (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the transcript. Undersigned counsel has begun a review of the exhibits. Undersigned counsel is currently assigned 21 cases; 15 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Daughma*. Undersigned counsel has completed a draft supplement to accompany appellant's petition for grant of review, to be filed next week.

The following cases before this Court also have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel moved this Court for oral argument; should oral argument be granted, preparation for such will take priority over the instant case.
2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Yesterday, the Government filed their answer. Undersigned counsel is currently preparing a draft reply to that answer, to be filed on 19 September 2024.
3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has begun drafting an assignment of errors brief, to be filed no later than 23 September 2024.

In addition, civilian co-counsel has two trial matters which take priority over this case:

1) *United States v. Goins* – This is a court-martial case out of Fort Riley, Kansas, scheduled for mid-September 2024.
2) *Daughpin Court of Common Pleas Case* – This is a trial in Pennsylvania, scheduled for the end of September 2024.

Since the filing of the previous motion of EOT, undersigned counsel has diligently been working other matters. Undersigned counsel drafted and filed a supplement to the CAAF in *United States v. Valentin-Andino* and has drafted a supplement for *United States v. Daughma*. Additionally, undersigned counsel drafted and filed a reply brief in *United States v. Pulley*, as well as a motion to reconsider this Court's decision in denying an EOT in *United States v. Couty*, to this Court. Undersigned counsel also completed a review of the case of *United States v. Kelnhofer* and began drafting two assignments of error.

Counsel have not contacted Appellant to provide him an update on the status of counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to requests for enlargement of time. Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 13 September 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

17 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed three forth of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process, but civilian defense counsel has begun reviewing the transcript.

Moreover, Appellant should be required to personally state his agreement or lack thereof to this specific delay. *See* United States v. Moreno, 63 M.J. 129. 137 (C.A.A.F. 2006)("There is no evidence in this case that the numerous requests for delay filed by appellate defense counsel benefited Moreno or that Moreno was consulted about and agreed to these delays.")

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40511**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Cassius A. MORENO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

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

This court held a status conference on 21 October 2024 to discuss the progress of Appellant's case. Ms. Mary Ellen Payne represented the Government. Mr. Jonathan Crisp and Captain Trevor N. Ward represented Appellant. Lieutenant Colonel Allen Abrams also attended as the Deputy Chief of the Appellate Defense Division. Appellant's counsel clarified that they had attempted to communicate with their client on this motion but had not been able to reach Appellant to obtain his input on this Enlargement of Time.

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED**. Appellant shall file any assignments of error not later than **22 November 2024**.

Each request for an enlargement of time will be considered on its merits. 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.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 15 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 November 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 412 days have elapsed. On the date requested, 450 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the record. Undersigned counsel has completed a review of the entire record and identified several potential errors. Civilian co-counsel has no matters which take priority over this case. Undersigned counsel is currently assigned 24 cases; 15 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel is presently drafting a brief on behalf of appellant to the CAAF, which is due on 30 October 2024.

In addition, the following cases before this Court also have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel moved this Court for oral argument; should oral argument be granted, preparation for such will take priority over the instant case.
2) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel filed an assignment of answers brief on 23 September 2024. The Government's Answer is due on 23 October 2024, with any reply due on 30 October 2024.

Since the filing of the previous motion of EOT, undersigned counsel has diligently been working other matters. For example, undersigned counsel drafted and field a supplement to the CAAF in *United States v. Daughma*. Additionally, undersigned counsel drafted and filed a reply brief to this Court in *United States v. Couty*. Further, undersigned counsel drafted and filed an assignment of errors brief in *United States v. Kelnhofer*.

Counsel have not contacted Appellant to provide him an update on the status of counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to requests for enlargement of time. Through no fault of Appellant, undersigned and civilian co-counsel have been unable to complete their review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and prepare an assignment of errors brief.

Moreover, civilian co-counsel recently suffered an injury to his left retina. As a result of this injury, he cannot see out of that eye, which is impeding his ability to read. Specifically, he is unable to complete a review of the record, review material drafted by undersigned counsel, or draft material of his own. An enlargement of time of 30 days will give civilian co-counsel time to recover from this injury, complete a review of the record, draft potential assignments of error, and review material drafted by undersigned counsel.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 15 October 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

17 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

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

Moreover, Appellant should be required to personally state his agreement or lack thereof to this specific delay. *See* United States v. Moreno, 63 M.J. 129. 137 (C.A.A.F. 2006) ("There is no evidence in this case that the numerous requests for delay filed by appellate defense counsel benefited Moreno or that Moreno was consulted about and agreed to these delays.") This is especially the case, since civilian counsel has apparently suffered an injury that is impeding his

ability to work on Appellant's brief, and it is unclear from the motion when civilian counsel will be able to resume work.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 15 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his thirteenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 December 2024**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 443 days have elapsed. On the date requested, 480 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has begun reviewing the record. Undersigned counsel has completed a review of the record and identified several potential errors. Undersigned counsel has also completed research on three of the identified errors. Civilian co-counsel has no matters which take priority over this case. Undersigned counsel is currently assigned 25 cases; 17 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel filed an initial brief on 30 October 2024, with a reply due no later than 9 December 2024. No case before this Court takes priority over the instant case.

Since the filing of the previous motion for EOT, undersigned counsel has diligently been working other matters. For example, undersigned counsel drafted and field an initial brief to the CAAF in *United States v. Valentin-Andino*. That brief required substantial research on a novel question of statutory interpretation that was specified by the CAAF in their grant order. Additionally, undersigned counsel drafted and filed a reply brief to this Court in *United States v. Kelnhofer*. Further, undersigned counsel completed a review of five peer filings amounting to nearly 100 pages of reviewed material. Undersigned counsel also took several days of leave to judge an undergraduate moot court tournament at his alma mater. Last, undersigned counsel is currently attending the four-day Appellate Judge's Education Institution Summit in Boston.

As noted in the previous Motion for EOT and subsequent status conference, civilian co-counsel recently suffered an injury to his left retina. As a result of this injury, he could not see out of that eye and was on doctor's orders not to strain his eyesight with excessive reading. Because of this injury, he was unable to complete a review of the record, review material drafted by

undersigned counsel, or draft material of his own. Yesterday, 14 November 2024,[1] Mr. Crisp was informed that the damage was sufficiently repaired to begin reading again. Due to this medical issue, Mr. Crisp was delayed in reviewing material pertinent to this appeal. An enlargement of time of 30 days will give civilian co-counsel time to complete a review of the record, draft potential assignments of error, and review material drafted by undersigned counsel.

Counsel have not contacted Appellant to provide him an update on the status of counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to requests for enlargement of time. Through no fault of Appellant, undersigned and civilian co-counsel have been unable to complete their review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and prepare an assignment of errors brief.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[1] Because civilian co-counsel was delayed in his review, undersigned counsel moved to review the case next in line in his docket: *United States v. Gibbs*. Undersigned counsel completed a review of the non-transcript pages of that record.

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 15 November 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

18 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 480 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed three forth of the 18-month standard for this Court to issue a decision, which only leaves about 2 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's civilian counsel has not completed review of the record of trial at this late stage of the appellate process.

Moreover, Appellant should be required to personally state his agreement or lack thereof to this specific delay. *See* United States v. Moreno, 63 M.J. 129. 137 (C.A.A.F. 2006) ("There is no evidence in this case that the numerous requests for delay filed by appellate defense counsel benefited Moreno or that Moreno was consulted about and agreed to these delays.")

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 November 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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 (FOURTEENTH)**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force *Appellant*	)	No. ACM 40511 13 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourteenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 15 days, which will end on **6 January 2025**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 471 days have elapsed. On the date requested, 495 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Convening Authority Decision on Action. Appellant is not currently confined.

The ROT is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages. Civilian co-counsel, Mr. Jonathan Crisp, has completed a review of the record and has begun drafting two assignments of error. Undersigned counsel has completed a review of the record and completed a draft of the remaining assignments of error. Civilian co-counsel has no matter which takes priority over this case. Undersigned counsel is currently assigned 26 cases; 16 cases are pending initial AOEs before this Court. Undersigned counsel has no matter which takes priority over this case.

This enlargement of time is being filed out of an abundance of caution. While undersigned and civilian co-counsel believe they can file the assignments of error brief before it is due on 22 December 2024, the 15-day enlargement will ensure that counsel file the assignments of error brief before it is due. This is especially true given the numerous federal holidays during the previous and current enlargement periods.

Counsel have been unable to contact Appellant to provide him an update on the status of counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to requests for enlargement of time. Through no fault of Appellant, civilian co-counsel has been unable to complete a draft brief in Appellant's case. An enlargement of time is necessary to allow counsel finalize the assignment of errors brief.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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(240) 612-2807

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 13 December 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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16 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) CASSIUS A. MORENO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40511 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 495 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed three forth of the 18-month standard for this Court to issue a decision, which only leaves about 2 months combined for the United States and this Court to perform their separate statutory responsibilities.

Moreover, Appellant should be required to personally state his agreement or lack thereof to this specific delay. *See* United States v. Moreno, 63 M.J. 129. 137 (C.A.A.F. 2006) ("There is no evidence in this case that the numerous requests for delay filed by appellate defense counsel benefited Moreno or that Moreno was consulted about and agreed to these delays.")

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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(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 16 December 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*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force, *Appellant*.	)	No. ACM 40511 6 January 2025

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

ASSIGNMENTS OF ERROR

I.

WHETHER SRA MORENO'S CONVICTION IS LEGALLY AND FACTUALLY SUFFICIENT.

II.

DID THE MILITARY JUDGE ERR WHEN SHE ADMITTED SRA MORENO'S RESPONSE THAT HE THOUGHT HE WAS GOING TO PRISON AFTER BEING APPREHENDED?

III.

WHETHER THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT ENGAGED IN IMPROPER BURDEN SHIFTING AND REPEATEDLY REFERENCED SRA MORENO'S OWNERSHIP OF A SNAPCHAT ACCOUNT WHEN THE MILITARY JUDGE HAD RULED SUCH EVIDENCE WAS INADMISSIBLE

STATEMENT OF THE CASE

On 19 April and 8-11 May 2023, SrA Moreno was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of attempting to commit a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11

May 2023, the members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*.

STATEMENT OF FACTS

Additional facts necessary for resolution of the specific issues raised are provided below.

ARGUMENT

I.

SRA MORENO'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

A. Additional Facts

SrA Moreno was stationed at Joint Base San Antonio (JBSA)-Lackland, Texas. R. at 233. A Naval Criminal Investigative Service (NCIS) special agent (SA) at JBSA initiated a sting operation involving a fake 14-year-old-girl named "Kelly." R. at 230, 234. The operation began when the agent, as "Kelly," made a post on a Reddit page called "18 Not Safe for Work." R. at 230-31, 273. According to NCIS, "not safe for work" refers to "sexual," "adult" content. R. at 273-74. SrA Moreno responded to the post and began a conversation with the agent on Reddit. R. at 233. During this conversation, the agent told SrA Moreno she was 14 years old. R. at 233. SrA Moreno did not discuss anything sexual with the agent in the Reddit messages. R. at 276; Pros. Ex. 2. After talking on Reddit, the agent and SrA Moreno began texting. Pros. Ex. 5. Throughout this conversation, SrA Moreno never exchanged any sexually explicit messages or photos. R. at 281-86; Pros. Ex. 2; Pros. Ex. 5.

1. Law enforcement pressure to talk about sex.

Rather, the agent was the first person to introduce the topic of sex. Pros. Ex. 5 at 2. Specifically, the agent told SrA Moreno that people on Reddit—the same social media website he posted on—is full of "people wanting to have sex." Pros. Ex. 5 at 2. Then, the agent asked SrA Moreno what they would do if they hung out. SrA Moreno never mentioned anything sexual. *See*, *e.g.*, Pros. Ex. 5 at 3 ("[A]ll I really do is drink a little with someone and vibe. . . . Just hang out and chill and talk."), 10 ("[C]hill and drink. . . . Just hang out and be friends. Nothing weird."), 11 ("Drink."). After not receiving a sexual response from SrA Moreno, the agent once again brought up sex. Pros. Ex. 5 at 10. When this, too, did not illicit a sexual response, the agent asked SrA Moreno again what he wanted to do if they hung out. Pros. Ex. 5 at 11. When SrA Moreno declined to talk about sex, the agent responded obtusely: "I was hoping [you] tell me what [you] want to do and ill [sic] tell [you] wat im [sic] comfortable with." Even with this invitation, SrA Moreno's response was still not sexual: "I just want to hang out with you the first time and get to know each other." Pros. Ex. 5 at 12. The agent tried again: "Like what . . . just trying to prepare . . . so about me . . . I feel better knowing what to expect." Pros. Ex. 5 at 15 (alterations in original). But SrA Moreno did not respond sexually. Pros. Ex. 5 at 15. Undeterred, the agent tried once more: "What would you wanna [sic] do?" Pros. Ex. 5 at 17. SrA Moreno responded: "Just hang out." Pros. Ex. 5 at 17.

After continual pressure over three days, SrA Moreno finally implied that he might be interested in sex with "Kelly." [1] Pros. Ex. 5 at 18. Although, even this suggestion was opaque. Pros Ex. 5 at 18 ("The reason I call people at night."). The agent then told SrA Moreno to bring a

[1] During this same conversation, the agent asked SrA Moreno if he had ever had sex with someone her age. Pros. Ex. 5 at 18. SrA Moreno replied that he had not. Pros. Ex. 5 at 18.

condom when they met. Pros. Ex. 5 at 18. When SrA Moreno declined to say whether he was bringing a condom for their first meeting, the agent stated again: "[For your information], I'm not on birth control. Will you bring anything?" Pros. Ex. 5 at 25 (cleaned up).

2. The plan to meet up and SrA Moreno's abandonment of that plan.

At some point during the conversation, SrA Moreno suggested meeting "Kelly." Pros. Ex. 5 at 3. However, SrA Moreno did not immediately create a plan to meet her. Pros. Ex. 5 at 3. Instead, a plan was created based solely on questions asked by "Kelly," such as "where?" and "when?" Pros. Ex. 5 at 3-4. After texting for several days, it became clear to NCIS that SrA Moreno did not have a specific plan, so the agent created new "avenues" for SrA Moreno to meet "Kelly." R. at 279. Based on this urging, SrA Moreno finally agreed to meet "Kelly." Pros. Ex. 5 at 21-22.

As part of this plan, the agent told SrA Moreno to drive to the end of Kisling Court on JBSA-Lackland, where "Kelly" supposedly lived. R. at 287. But, on the night they were to meet, SrA Moreno did not drive down Kisling Court despite knowing where it was and how to get there. R. at 288, 373-76. Instead, he drove past it twice on an adjacent road, Erwin Circle. R. at 289, 376. While driving on Erwin Circle, SrA Moreno did not think he could "follow through with meeting up with [Kelly]." R. at 375. This was because he knew it was wrong for a 23-year-old to hang out with a 14-year-old. R. at 375. At this point, SrA Moreno decided to go back home and turned to leave Erwin Circle. R. at 376. Astutely, law enforcement agents were concerned that SrA Moreno was going to leave base.[2] R. at 296. So, law enforcement arrested SrA Moreno despite him never turning on Kisling Court. The members were subsequently instructed that "the defense of voluntary abandonment has been raised by the evidence." R. at 443.

[2] Ostensibly, this is because they thought SrA Moreno identified a law enforcement vehicle. R. at 296. However, all law enforcement vehicles in the area were unmarked. R. at 291. And, SrA Moreno testified he did not see any law enforcement vehicles. R. at 374.

When he was arrested, there were unopened alcohol containers and a condom in SrA Moreno's car. R. at 325. The Government attempted to admit evidence of this through a photograph. R. at 254-68. However, they could not lay the foundation to do so because the witness lacked personal knowledge of the contents (i.e., the white claw and condom in the car). R. at 254-68. Nonetheless, the military judge admitted the substance of this evidence through member questions. App. Ex. XXXV; App. Ex. XL; R. at 331, 338.

B. Standard of Review

This Court reviews legal and factual sufficiency questions de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (CMA 1990)).

C. Law and Analysis

SrA Moreno's conviction is legally and factually insufficient for three reasons. First, law enforcement entrapped SrA Moreno to commit the charged misconduct. Second, SrA Moreno lacked the specific intent to commit the charged misconduct. And third, assuming SrA Moreno had the requisite intent, he voluntarily abandoned any plan to commit the misconduct.

This Court may affirm only such findings that are "correct in law and fact." Article 66(d), UCMJ. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

Factual sufficiency requires this Court to determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [the Court] are themselves convinced of the accused's guilt beyond a reasonable

doubt."[3] *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citation omitted). A review for factual sufficiency "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Washington*, 57 M.J. at 399. This is an "impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (cleaned up). This Court has the power to "judge the credibility of witnesses, determine controverted questions of fact . . . and substitute its judgment for that of the military judge." *Col*e, 31 M.J. at 272.

> 1. SrA Moreno did not have a predisposition to commit the charged misconduct but was instead induced by the Government to commit it. Therefore, his conviction is legally and factually insufficient.

Entrapment is an affirmative defense. "It is a defense that the criminal design or suggestion to commit the offense originated in the government and the accused had no predisposition to commit the offense." R.C.M. 916(g). The Court of Appeals for the Armed Forces (C.A.A.F.) has described two elements for the defense: (1) "government inducement" and (2) "an accused with no predisposition to commit the offense." *United States v. Howell*, 36 M.J. 354, 358 (C.A.A.F. 1993). Entrapment also involves a shifting burden of proof:

> The defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime. Once the defense has come forward, the burden then shifts to the Government to prove beyond a reasonable doubt that

[3] SrA Moreno recognizes that Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B), has been amended. *See United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, at *6-10 (C.A.A.F. 2024). However, these amendments do not change the factual sufficiency standard. *Id.* at *10 ("We do not read the phrase 'weight of the evidence' as an alteration of the necessary quantum of proof to sustain a finding of guilty."), *12 ("Appellant argues that th[e] phrase ['clearly convinced'] does not change the necessary quantum of proof. . . . We agree.").

> the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense "prior to first being approached by Government agents."

United States v. Hall, 56 M.J. 432, 436 (C.A.A.F. 2002) (citations omitted) (quoting *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992)). Viewing the evidence in the light most favorable to the prosecution, the Government did not meet its burden of proving that (1) the criminal design did not originate with the Government or (2) SrA Moreno had a predisposition to the commit the charged misconduct.

The Government induced SrA Moreno to commit the charged misconduct. Inducement "means more than merely providing the appellant the means or opportunity to commit a crime." *United States v. Lozicki*, No. ACM 39643, 2020 CCA LEXIS 469, at *25 (A.F. Ct. Crim. App. Dec. 28, 2020). Rather, the Government must "create a substantial risk that a[] . . . law abiding citizen would commit the offense." *Id*. (quoting *United States v. Howell*, 36 M.J. 354, 358 (C.M.A. 1993)). And, while Government agents can pretend to be someone they are not to "ferret out crime," they may not use deception to "actually implant[] the criminal design in the mind of the defendant." *United States v. Kitchen*, No. ACM 40155, 2023 CCA LEXIS 58, at *17 (A.F. Ct. Crim. App. Feb. 3, 2023) (citing *Jacobson v. United States*, 503 U.S. 540, 548 (1922); *United States v. Russell*, 411 U.S. 423, 435-36 (1973); *Howell*, 36 M.J. at 358).

In this case, law enforcement implanted the criminal design at several stages. At the outset, law enforcement posted a message on a social media page titled "18 Not Safe for Work." R. at 273. "Not safe for work" is an online phrase that means sexual or adult content. R. at 273-74. Despite this, law enforcement made a post on that page posing as a 14-year-old-girl. R. at 233. In doing so, law enforcement implanted the criminal design on readers—such as SrA Moreno—to engage in a sexually charged conversation with a 14-year-old girl. Next, it was law enforcement,

not SrA Moreno, who introduced the topic of sex. Prosecution Exhibit 5 at 2. In fact, SrA Moreno did not send a single sexually explicit message or photo to "Kelly," despite repeated goading from law enforcement to do so. Pros. Ex. 2; Pros. Ex. 5. Then, when SrA Moreno declined to make a specific plan to meet "Kelly," law enforcement invented "new avenues" to induce him to the criminal venture. R. at 279. Any one of these steps would have been sufficient for law enforcement to implant the criminal design. Taken together, they clearly demonstrate law enforcement inducement of SrA Moreno.

Further, SrA Moreno did not have a predisposition to commit the charged misconduct. This is evident from his reluctance to engage in any sexually explicit messages or acts with "Kelly," despite being repeatedly pressured by law enforcement to do so. Pros. Ex. 5. It is further demonstrated by the fact that SrA Moreno never previously engaged in any type of relationship—friendly or otherwise—with underage girls. Pros. Ex. 5 at 18. As such, SrA Moreno did not have the predisposition to commit the charged misconduct.

This Court has decided several cases involving entrapment for attempted sexual abuse of a child. These cases show that law enforcement action in this case amounted to entrapment. For example, in *United States v. Gause-Radke*, this Court held that law enforcement did not entrap appellant because he already had the criminal design to commit sexual abuse of a child. No. ACM 40343, 2023 CCA LEXIS 384, at *19-20 (A.F. Ct. Crim. App. Sep. 11, 2023). That is because the appellant specifically asked law enforcement—acting as the victim—if she wanted to have sex.[4] *Id*. at *20. That never happened in this case. Not only did SrA Moreno never meet with any underage girls—including "Kelly"—he never asked "Kelly" for sex. Pros. Ex. 5.

[4] This question was posed after the appellant already had sexual contact with the victim, an underage girl. *Gause*-Radke, 2023 CCA LEXIS 384, at *20.

This case is also distinct from *Kitchen*. In that case, this Court reasoned that while the appellant had no "history of or interest in sexual acts against children," it was the appellant—not law enforcement—who elevated the conversation to sex. *Kitchen*, 2023 CCA LEXIS, at *18-19. This Court found that elevating the conversation to sex was a "criminal offer[] without inducement." *Id*. at *19. Similarly, in *United States v. Miller*, this Court determined an appellant was not entrapped because he initiated sexually explicit conversations and sent sexually charged images to a fake underage girl. No. ACM 39747 ,2021 CCA LEXIS 95, at *18-19 (A.F. Ct. Crim. App. Mar. 3, 2021). Here, SrA Moreno never made a "criminal offer" like the one in *Kitchen*, nor did he send sexually charged messages to "Kelly." Rather, he was pressured by law enforcement to engage in a sexual conversation with "Kelly," but declined he declined to do so. Pros. Ex. 5.

Finally, in *Lozicki*, this Court made clear that "inducement requires more than simply being presented with the opportunity to commit the crime." 2020 CCA LEXIS 469, at *30 (cleaned up). Like this case, law enforcement in *Lozicki* made a social media post and had a conversation with an airman. *Id*. at *30-31. Unlike this case, however, "it was [the appellant] who escalated the conversation to use explicit and graphic sexual terms."[5] *Id.* at *30. Further, it was the appellant, not law enforcement, "who repeatedly requested . . . to meet." *Id.* at *30-31. Similar facts do not exist in this case.

No rational trier of fact could have been convinced, beyond a reasonable doubt, that the Government did not entrap SrA Moreno. Even if this Court believes a rational trier of fact could find SrA Moreno guilty, this Court itself should not be convinced beyond a reasonable doubt that

[5] The appellant sent at least ten different indecent communications to include asking the fake underage girl to "take a picture while masturbating." *Lozicki*, 2020 CCA LEXIS 469, at *33.

the Government's actions did not amount to entrapment. As such, the conviction should be set aside as legally and factually insufficient.

2. SrA Moreno lacked the specific intent to commit an attempted sexual abuse of a child.

"In order to convict on an attempt offense . . . the Government is required to prove beyond a reasonable doubt that the accused did a certain overt act [and] that act was done with the specific intent to commit [the] offense." *Kitchen*, 2023 CCA LEXIS 58, at *14. The Government did not prove beyond a reasonable doubt that SrA Moreno had the specific intent commit a sexual act on "Kelly," the "certain overt act." Despite numerous attempts by law enforcement, SrA Moreno never articulated that he wanted to have sex with "Kelly." Pros. Ex. 5. Instead, he merely indicated a desire to hang out with "Kelly" and "vibe." Pros. Ex. 5. This is a far cry from a specific intent to engage in sexual acts. In *Kitchen*, this Court reasoned that the appellant had a specific intent to have vaginal intercourse with the fake 14-year-old because he sent messages explaining that he wanted to have vaginal intercourse with her. 2023 CCA LEXIS 58, at *20. Law enforcement, in turn, told the appellant that she wanted to have vaginal intercourse. *Id*. SrA Moreno sent no such messages to "Kelly."

The Government argued at trial that SrA Moreno intended to have sex with "Kelly" because there was a condom in his car at the time he was apprehended. *See, e.g.*, R. at 451. There are two problems with this. First, having a condom in one's car does not prove intent to commit a sexual act upon a child. Second, even assuming that it could prove specific intent, that evidence was erroneously admitted at trial.

Therefore, no rational trier of fact could have found beyond a reasonable doubt that SrA Moreno had the specific intent to have sexual contact with "Kelly." Even if this Court disagrees,

this Court itself should not be convinced that SrA Moreno had the specific intent to commit the charged act.

3. Even assuming SrA Moreno had the specific intent to commit the sexual act at some point, he nevertheless voluntarily abandoned any plan to commit the misconduct. Therefore, his conviction is legally and factually insufficient.

"Voluntary abandonment is a defense to the crime of attempt." *United States v. Feliciano*, 76 M.J. 237, 230 (C.A.A.F. 2017) (quoting *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987)). When an appellant "only ceased acting . . . because of unanticipated difficulties, unexpected resistance, or circumstances which increase[d] the probability of detention or apprehension," the defense of voluntary abandonment is not available. *Id*. at 240 (cleaned up). External forces, such as "fear of immediate detection or apprehension" prohibit this defense. *United States v. Harjung*, No. ACM 39661, 2020 CCA LEXIS 331, at *16 (A.F. Ct. Crim. App. Sep. 11, 2020) (quotation marks and citation omitted).

There is ample evidence that SrA Moreno voluntarily abandoned any plan to have sexual contact with "Kelly." Despite knowing the specific location to meet "Kelly"—Kisling Court—SrA Moreno never arrived at that location. R. at 287, 289, 376. Instead, he drove on an adjacent road—Erwin Circle—going past Kisling Court twice. R. at 289, 376. SrA Moreno testified that he knew where Kisling Court was and made a conscious choice not to drive down it. R. at 373-76. Then, after realizing meeting with a 14-year-old girl was wrong, he decided to leave and go home. He was apprehended before ever turning on Kisling Court. R. at 375-76. Moreover, SrA Moreno's abandonment was not based on circumstances that increased the probability of his detention or apprehension; he did not know "Kelly" was an NCIS agent, nor did he believe law enforcement was at Kisling Court. R. at 374.

Other military sting operation cases are illustrative here. For example, in *United States v. Allen*, the appellant went to the house of a fake, underage girl, and stood on the stair landing outside her door. 2017 CCA LEXIS 649, at *29. In that case, this Court reasoned that there was no voluntary abandonment because the appellant made "no move to leave." *Id*. In another case, *United States v. Preston*, the appellant showed concern about getting caught, asking a fake underage girl "You not trying to set me up right." No. ACM 38996, 2017 CCA LEXIS 596, at *15 (A.F. Ct. Crim. App. Aug. 31, 2017), *rev. on other grounds*, 77 M.J. 313 (C.A.A.F. 2018). That appellant was later arrested in the driveway of the fake girl's home. *Id*. But this case is distinct in three ways: (1) SrA Moreno never went to the location where he was supposed to meet "Kelly;" (2) SrA Moreno was apprehended *while leaving* Erwin Court; and (3) SrA Moreno did not abandon his plan because he was afraid of getting caught.

This case is also distinct from *United States v. Easterly*, where the appellant was convicted of attempted murder. No. ACM 39310, 2019 CCA LEXIS 175, at *2 (A.F. Ct. Crim. App. Apr. 12, 2019). That appellant went to the victim's house, knocked twice on the door, and waited 20 minutes before leaving. *Id*. at *37. Appellant argued that he abandoned his plan to commit murder because he left before the victim returned home. *Id*. at *36-37. This Court reasoned that there was no abandonment because of statements appellant made to a friend after: "Thank God she wasn't home because otherwise I may have done it . . . I might have actually harmed her." *Id*. at *37 (cleaned up). This, combined with waiting 20 minutes outside the victim's door, convinced this Court that there was no voluntary abandonment. Similarly, in *United States v. Rio*, the Court of Military Appeals (CMA) held that voluntary abandonment did not exist in a case where an appellant withdrew from one robbery in order to commit another, more advantageous one. 33 M.J. 436, 440-41 (C.M.A. 1991). Here, there is no evidence that SrA Moreno was waiting for

"Kelly" to come to his car nor was there evidence that he abandoned his plan to commit a different, more advantageous crime.

Therefore, no rational trier of fact could have found, beyond a reasonable doubt, that SrA Moreno committed the charged misconduct because he voluntarily abandoned any plan to commit the misconduct. And, even if this Court disagrees, this Court itself should not be convinced beyond a reasonable doubt of SrA Moreno's guilt.

WHEREFORE, SrA Moreno requests this Court set aside the finding and sentence as legally and factually insufficient.

II.

THE MILITARY JUDGE ERRED WHEN SHE ADMITTED SRA MORENO'S RESPONSE THAT HE THOUGHT HE WAS GOING TO PRISON AFTER BEING APPREHENDED

A. Additional Facts

Upon SrA Moreno's apprehension and detention he was questioned by law enforcement after executing a rights waiver. R. at 271, Pros Ex. 8. After waiving his Article 31 rights, SrA Moreno was interrogated by two different law enforcement agents. R. at 349. During the course of the interrogation, SrA Moreno was asked to speculate what he thought was going to happen to him for purportedly texting a minor and driving to see her. R. at 349. He answered, "I assume prison." R. at 349. During the court-martial, SrA Moreno took the stand and was questioned further about why he said he thought he was going to prison after being brought to OSI and he said, "I had no idea how it worked afterwards." R. at 401. He later further elaborated during cross examination that he said "prison" because he simply did not know what the next step was, not because he thought he was guilty of anything. R. at 403. The defense objected to the admission of SrA Moreno's response regarding what he thought was going to happen next was that he was

going to prison, but the military judge admitted it on the basis that it showed consciousness of guilt. R. at 198. The military judge did not further elaborate as to why, but indicated she would provide a limiting instruction; one was not provided. R. at 198.

B. Standard of Review

This Court reviews the military judge's evidentiary rulings under an abuse of discretion standard. *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010).

C. Law and Argument

To admit evidence of SrA Moreno's statement, an analysis under military rule of evidence (M.R.E.) 404(b) must be conducted and the seminal test under that rule is the *Reynolds* test:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact ... of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value ... substantially outweighed by the danger of unfair prejudice"?

United States v Reynolds, 29 M.J. 105, 109 (C.M.A 1989).

In *United States v. Rhodes*, 61 M.J. 445, (C.A.A.F. 2005), the C.A.A.F. discusses the concept of consciousness of guilt in the context of a witness having a change in memory and later claiming he had memory loss of the incident in question. The C.A.A.F. cites to a federal circuit court case in support of the idea that there may be alternate explanations for why one's memory may change. *Id*. at 452. The court opined that where there are potential alternative explanations for the change in memory, it is error to admit the fact of the change as consciousness of guilt evidence.

In the present case, the military judge did not analyze why she believed it met the three-prong test. Thus, we are left to surmise why it passed the three prongs. Prong one requires the evidence to reasonably support a finding by the court-members that the accused committed the crime. Here, there are potentially multiple explanations as to why SrA Moreno said he thought he was going to prison. The context of the question and the preceding questions are vague and ambiguous at best, and cannot reasonably establish guilt for the act itself.

As stated in *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021), "[c]onsciousness of guilt evidence is an acceptable form of circumstantial evidence used to show '*awareness* of an accused that he or she has engaged in blameworthy conduct.'" (quoting, *Black's Law Dictionary*, 379 (11th ed. 2019)) (emphasis added). In the case *sub judice*, as is evidenced from the facts adduced at trial, no such awareness can be demonstrated. Law enforcement personnel did not clearly ask him what should happen to people who try and have sex with a minor, or similar type questions. To be clear, he was asked what he thought was going to happen. He was asked to speculate in a vacuum—after being detained and questioned by law enforcement. SrA Moreno had no idea what was going to happen to him. The context for showing consciousness of guilt is patently absent. Accordingly, admission of the statement is error.

The next step for this Court is to determine whether the admission prejudiced SrA Moreno. "Where error is founded on a violation of Rule 404(b), the test for harmlessness is whether we can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Rhodes*, 61 M.J. at 453. (internal citations omitted). The reasoning of the Court in *Rhodes* is particularly probative here. In *Rhodes*, the trial counsel used the consciousness of guilt to suggest the accused's guilt in closing argument which is exactly what happened here. In closing, the trial counsel said exactly

what defense counsel knew was going to happen: the Government used the prison statement to show SrA Moreno's alleged awareness that he knew what he did was wrong. R. at 455. The idea that SrA Moreno knew he was wrong and allegedly admitted it clearly undermined the defense's argument that he had abandoned the venture. If he had withdrawn then he would not have believed he was going to jail. Consequently, the prejudice is clear.

WHEREFORE, SrA Moreno requests this Court set aside the finding and sentence because the Military Judge abused her discretion and such abuse prejudiced Appellant.

III.

THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT ENGAGED IN IMPROPER BURDEN SHIFTING AND REPEATEDLY REFERENCED SRA MORENO'S OWNERSHIP OF A SNAPCHAT ACCOUNT WHEN THE MILITARY JUDGE HAD RULED SUCH EVIDENCE WAS INADMISSIBLE

A. Additional Facts

The defense sought to exclude any reference to SrA Moreno's possession of a Snapchat account in pre-trial motions and the military judge agreed, ruling such references were inadmissible. R. at 187, 388. However, during cross-examination of SrA Moreno, the Trial Counsel questioned SrA Moreno as to his use of a Snapchat account and his alleged efforts to get Kelly to use one. R. at 388. In addition, in closing argument, the Trial Counsel started to talk about his own personal knowledge of Snapchat but began to reference it in a nefarious way. R. at 452. Also in closing, the Trial Counsel stated that SrA Moreno could not disprove certain facts from the law enforcement agent and that because of that SrA Moreno was unreliable and guilty. R. at 461. In all instances, timely objections were raised and sustained.

Trial began on 8 May 2023, R. at 11, and concluded on 11 May 2023 at 1935. R. at 530. Merits began on 9 May at 1444, R. at 200, and then the members were released for the day after opening arguments at 1501. R. at 204. Testimony began at 0935 on 10 May, R. at 227, closings and final instructions were concluded at 1245 on 11 May 2023. The panel deliberated from 1432 on 11 May 2023 until 1610 on 11 May 2023.

B. Standard of Review

Prosecutorial misconduct and improper argument is reviewed under a *de novo* standard. If an objection is lodged, then it is reviewed for prejudicial error. *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018).

C. Law and Argument

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Relief should be granted when the Trial Counsel's misconduct impacts a substantial right of an accused. *Id*.

Moreover, "[p]rosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).

Courts are to "weigh three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.'" *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). In determining the severity of the prosecutorial misconduct *Fletcher* outlined five additional factors to observe:

> (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge."

Id. at 184.

There were extensive discussions in various Article 39a sessions regarding the probative value and admission of the Snapchat accounts. The military judge clearly ruled that because Snapchat was not used in this case that any reference to it was not probative. The Trial Counsel was clear in his understanding, but still sought to question SrA Moreno as to his use of Snapchat and how it functions. When the defense counsel objected, the military judge sustained the objection but failed to provide any guidance to the panel in the form of a curative instruction. Similarly, the Trial Counsel brought up Snapchat again in closing in the context of SrA Moreno allegedly using it to hide or cover his misdeeds. Trial Counsel did so despite knowing it was inadmissible and having been told at least twice not to discuss it. However, not only did he try and argue it as evidence of a crime, he sought to inject his own personal experiences into the case when he said, "[N]ow, I don't have Snapchat, but for my job you encounter a lot of young airmen, and young airmen . . . "

His use or misuse of the evidence was pervasive and consistent throughout the trial and included closing arguments. The trial length was only four days, but one day consisted of voir dire and pre-trial motions. The merits portion was only one and a half days long. The panel deliberated less than two hours.

The judge issued a clear ruling on the issue of the Snapchat account and Trial Counsel disregarded it multiple times. In addition, he inserted his personal belief into closing arguments in conjunction with the Snapchat argument. The Military Judge failed to provide any curative instruction to the panel after these errors.

In addition to disregarding the judge's ruling regarding the Snapchat account, the Trial Counsel engaged in burden shifting implicating SrA Moreno's Fifth Amendment right to a presumption of innocence. The military judge provided the panel with a simple statement that "the burden never shifts to the accused." R. at 461. These factors clearly show the misconduct was severe.

The Military Judge's measures in curing the misconduct were woefully inadequate. She gave one weak instruction regarding the burden shifting that it does not shift to the accused. She did not state that he had no obligation to do anything or that they should not draw any adverse inference if he failed to do so or anything similar.

The final prong is the weight of the evidence. The evidence, as argued above in the sufficiency analysis was not overwhelming. Moreover, the misconduct of the Government was clearly aimed at undermining SrA Moreno's defense of abandonment. The Government attempted to introduce inadmissible M.R.E. 404(b) propensity evidence in the form of the Snapchat account to show he could not have abandoned the activity because this is what he does. The Government further sought to show that he had an obligation to disprove the arguments of the la enforcement agent. He did not. SrA Moreno was driving away from the scene when he was apprehended and was never on the street in question. Of significance too is the fact the Government was permitted to introduce "evidence" of his consciousness of guilt as also discussed *supra*. He provided a plausible reason for thinking he was going to jail. Even assuming, *arguendo,* that some evidence exists of SrA Moreno's guilt, it was not so compelling as to overcome the first two factors.

WHEREFORE, SrA Moreno requests this Court set aside the finding and sentence because the Trial Counsel engaged in Prosecutorial Misconduct to such an extent that is impacted SrA Moreon's right to be presumed innocent and to a fair trial.

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 Government Trial and Appellate Operations Division on 6 January 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel 1
Senior Airman (E-4) **CASSIUS A. MORENO**, USAF Appellant.	)	No. ACM 40511
	)	5 February 2025

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

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INDEX OF BRIEF

III.

ANY IMPROPER DISCUSSION OF PRECLUDED EVIDENCE OR MISLEADING STATEMENTS CONCERNING THE BURDEN OF PROOF WERE CURED THROUGH SUSTAINED OBJECTIONS AND THE MILTARY JUDGE'S INSTRUCTIONS.

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

AIR FORCE COURT OF CRIMINAL APPEALS

OTHER AUTHORITIES

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 1
Senior Airman (E-4) **CASSIUS A. MORENO**, United States Air Force *Appellant.*	)	No. ACM 40511 5 February 2025

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT]'S CONVICTION IS LEGALLY AND FACTUALLY SUFFICIENT.

II.

DID THE MILITARY JUDGE ERR WHEN SHE ADMITTED [APPELLANT]'S RESPONSE THAT HE THOUGHT HE WAS GOING TO PRISON AFTER BEING APPREHENDED?

III.

WHETHER THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT ENGAGED IN IMPROPER BURDEN SHIFTING AND REPEATEDLY REFERENCED [APPELLANT]'S OWNERSHIP OF A SNAPCHAT ACCOUNT WHEN THE MILITARY JUDGE HAD RULED SUCH EVIDENCE WAS INADMISSIBLE.

STATEMENT OF CASE

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

STATEMENT OF FACTS

On or about 2 August 2022, at Joint Base San Antonio (JBSA)-Lackland, Texas. a Naval Criminal Investigative Service (NCIS) special agent (SA) initiated an operation geared toward catching individuals attempting to commit sexual crimes against children, or "Internet Crimes Against Children" (ICAT) operation. (R. at 228-34.) As a part of this operation, SA GM created an online persona who appeared to be a 14-year-old-girl named "Kelly." Posing as "Kelly," SA GM made a post on a Reddit page titled "18 Not Safe for Work."[1] (R. at 230-31, 273; Pros. Ex. 1.) In that post, which "Kelly" titled, "Stuck on base!!!," she mentioned that her family has moved her "AGAIN," she was stuck on Lackland and that she was "a girl hoping to connect with like minded ppl." (Pros. Ex. 1.)

Based on the few details in that post, Appellant responded and began a conversation with "Kelly" using Reddit's private messaging feature. (R. at 233; Pros. Ex. 2). He said, hi and proposed that they chat the following day. (Pros. Ex. 2 at 1.) The very next day, on 3 August 2022, Appellant messaged "Kelly" on Reddit again. (Id.) Almost immediately during the conversation, "Kelly" brought up age and asked Appellant how old he was. (Id.) Appellant stated he was 23, and "Kelly" told Appellant she was 14 years old. (Id. at 1-2.) Undeterred by this information, Appellant simply responded, "makes sense" and kept the conversation going. (Id. at 2.) He asked her details about her family, her mother's work schedule, where she lives, and whether she had a Snapchat account. (Id. at 2-11.)

Appellant also suggested that he would provide "Kelly" alcohol if they "bec[a]me friends." (Id. at 5.) He asked her how she planned to hang out with "older people" and whether

[1] According to SA GM, "not safe for work" refers to "sexual" or "adult" content. (R. at 273-74.)

her mom would "cool with [her] going out and stuff." (Id. at 7.) During this conversation, Appellant told "Kelly" that he could "visit [her]" since he can drive. (Id. at 8.) He also sent photos of himself and requested photos of her. (Id. at 2-11.)

After receiving the first photo from "Kelly,"[2] Appellant told her, "oh you're so cute haha…if that's weird I'm sorry lol…[d]o you want to meet up during my lunch? It's at 12." (Id. at 9; Pros. Ex. 4 at 1.) "Kelly" then asked, "what do you do for lunch?," to which Appellant responded, "I usually just chill in my car and nap lol." (Id. at 10.) He volunteered that his car was quite "spacious in the back." (Id.) Appellant deleted the photo he had sent of himself from the thread a few moments after sending it. (Id. at 9.) After that, Kelly asked Appellant if he could text instead. (Pros. Ex. 2 at 11.) Appellant replied, "sure." Kelly then provided her phone number. (Id.) Appellant then sent Kelly a text message and most of the conversation thereafter was via text. (Pros. Ex. 5.)

Eventually, the conversation progressed to making a plan to "meet up" wherein Appellant would drive to the base at around midnight and "Kelly" sneak out of her house, located on Kisling Court, on the housing side of JBSA-Lackland, and Appellant would pick "Kelly" up in his car. (Pros. Ex. 2, 5, 8, 9; R. at 384.) Prior to the plan to meet, Appellant and "Kelly" discussed what they would do together, implying the possibility of engaging in sexual activity. (Pros. Ex. 5.) They also discussed bringing something to drink and whether he would "bring something" because "Kelly" was not on birth control. (Pros. Ex. 5.)

Late in the evening of 10 August 2022, Appellant was observed by law enforcement driving around Erwin Circle near where he was supposed to pick her up, the park by her house

[2] This photo depicted a young girl, from her shoulders up, clothed and smiling, with a nearly blank background. (*See* Pros. Ex. 4 at 1.)

on Kisling Court. (R. at 250; *See* Pros. Ex. 6.) There, he was subsequently apprehended and taken into the OSI/NCIS detachment for questioning. (R. at 268.) Following his apprehension, a condom and several cans of White Claw were found in his car. (R. at 268.)

While he was at the OSI/NCIS detachment, Appellant waived his rights and agreed to speak with the agents. (R. at 268, Pros. Ex. 9.) Immediately after his apprehension by law enforcement, Appellant was provided a rights advisement. He waived his rights and decided to speak with the investigators. During this conversation, he told the agents that he saw the "OSI car" on the street as he was "just kind of feeling the place out before he turned down the court." He also confirmed that he became "afraid" and "concerned when [he] saw that SUV." (Pros. Ex. 9; R. at 351.)

While at the detachment, Appellant also agreed to provide a written statement. (R. at 268; Pros. Ex. 8.) Most notably, Appellant stated therein, "I admit my attempt to try to meet this minor while having alcohol and a condom with me. It is obviously my worst mistake and one I was very unsure of making. Even with my uncertainty, I still attempted to follow through and was stopped and detained by the federal agents." (Pros. Ex. 8 at 3.)

ARGUMENT

I.

APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Factual Sufficiency

A court of criminal appeals (CCA) "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." 10 U.S.C. §

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

If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. The CCA must also give "appropriate deference to findings of fact entered into the record by the military judge." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 2024 CAAF LEXIS 502, *8. Concerning "appropriate deference," the Harvey Court explained further,

> For example, a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify. In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low.

Id.

Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

This Court has also agreed with the interpretation in Harvey. *See* United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, at *23 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.)

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

(emphasis added). In Csiti, this Court also said, "in order to set aside a finding of guilty we must be *clearly convinced* that the weight of the evidence does not support the conviction beyond a reasonable doubt." Id. at *23.

Legal Sufficiency

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). And proof beyond a reasonable doubt does not require proof that overcomes every *possible* doubt. *See* United States v. McClour, 76 M.J. 23, 24 (C.A.A.F. 2017) (quoting the Air Force reasonable doubt instruction) (emphasis in original). "It is enough that the evidence firmly convinces the trier-of-fact of the accused's guilt." United States v. Hernandez, No. ACM 39606 (rem), 2023 CCA LEXIS 104 (A.F. Ct. Crim. App. Feb. 28, 2023).

In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the

standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

Law/Analysis

Appellant's guilty finding for attempting to commit a sexual act upon a child is factually and legally sufficient. To sustain a conviction for attempted sexual assault of a child, the government was required to prove, beyond a reasonable doubt, that Appellant attempted to commit a sexual act on a child who had attained the age of 12 years but had not attained the age of 16 years. Manual for Courts-Martial, United States, pt. IV, ¶ 62.e.(2)(a). The charge and specification brought against Appellant in this case was as follows:

> In that SENIOR AIRMAN CASSIUS A. MORENO, United States Air Force, 502d Logistics Readiness Squadron, Joint Base San Antonio-Lackland, Texas, did, at or near San Antonio, Texas, between on or about 10 August 2022 and on or about 11 August 2022, attempt to commit a sexual act upon "Kelly," a child whom SENIOR AIRMAN MORENO believed to be 14 years of age, by penetrating her vulva with his penis.

(*Charge Sheet*, ROT, Vol. 1 at 1.) After a full trial on the merits, a panel of officer members found Appellant guilty of this charge and its specification. (R. at 490-91; *Entry of Judgment*, 27 July 2023, ROT, Vol. 1.) While there were a few issues of contested fact, the government's evidence established each element of the charged offense sufficient to factually and legally support Appellant's conviction.

First, Appellant failed to trigger factual sufficiency review on this matter because he did not demonstrate a specific deficiency in proof. Appellant essentially argues that his conduct surrounding the incident did not demonstrate that he had the requisite intent to commit the charged offense, the federal agents "entrapped" him, and that he demonstrated voluntary abandonment of his plan prior to his arrest. (App. Br. at 5.) While these may have very well

been the theories advanced by his defense counsel at trial, Appellant neglects to point to a specific area where the government's evidence was actually lacking with respect to the elements of the charged offense. The government's evidence is not rendered insufficient simply because the accused contested it or otherwise asserted a defense at trial. Under this assignment of error, Appellant's principal argument is really just that the members reached the incorrect conclusion.

Even if this Court decides Appellant met both threshold elements to trigger factual sufficiency review, the weight of the evidence supports Appellant's conviction for attempted sexual assault of a child, notwithstanding the version of events he provided during his testimony, modified from his prior statements to law enforcement. If this Court decides that both threshold triggers for factual sufficiency review are met, then this Court may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). Giving appropriate "deference to the fact that the trial court saw and heard the witnesses and other evidence," this Court must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

Considering all the facts the trier of fact had before it, including Appellant's own statements and the inconsistencies therein, the weight of the evidence supports the conviction beyond a reasonable doubt and was not clearly "against the weight of the evidence." 10 U.S.C. § 866(d)(1)(B)(iii). Appellant's three-part factual and legal sufficiency argument seems to center around the question of Appellant's intent. (App. Br. at 5.) The first argument, regarding law enforcement entrapment, requires a factfinder to consider whether the criminal design originated with the government agent or the accused. *See generally* R.C.M. 916(g); *also see* United States v. Hall, 56 M.J. 432, 436 (C.A.A.F. 2002). Where the government agent first suggested the

offense, the factfinder must also decide whether the accused had a predisposition to commit the offense prior to the suggestion by law enforcement. Id. Appellant's second argument, as plainly stated, challenges his specific intent. And finally, the third argument under this point assumes that Appellant had the requisite intent to commit the offense at some point but requires the factfinder to determine whether he "voluntarily abandoned his plan." (App. Br. at 5.)

Entrapment

The evidence established that the criminal design originated with the Appellant. As stated by Appellant, "inducement" means more than merely providing the appellant the means or opportunity to commit a crime; the government must create a substantial risk that a law-abiding citizen would commit the offense. United States v. Lozicki, No. ACM 39643 2020 CCA LEXIS 469 (A.F. Ct. Crim. App. Dec. 28, 2020)(unpub. op.)(quoting Hall, 56 M.J. at 436). (App. Br. at 5.)

Appellant argues that the government agents "induced [him] to commit the charged misconduct" by creating a public post on a social media page titled, "18 Not Safe for Work" while posing as a 14 year-old girl. (App. Br. at 7.) He explains that, while not directed to any specific person, the public page's title implies sexual or adult content and, therefore, "implants the criminal design on readers – such as [Appellant] – to engage in a sexually charged conversation with a 14 year-old-girl." (App. Br. at 7, citing R. at 273.)

But Appellant fails to explain how the government agent induced him to visit Reddit in the first place. He neglects to describe how they enticed him to visit a page titled "18 Not Safe for Work," or caused him to initiate a conversation with what appeared to be a young, military-affiliated female. (Pros. Ex. 1.) Further, Appellant does not provide any viable theory as to how, after quickly learning that "Kelly" was 14, the government influenced him to continue chatting

and inquiring into "Kelly's" situation. (Pros. Ex. 2 at 2.) For example, it is unclear as to how the government prompted him to ask "Kelly" what her mom did for work, whether she was ever left alone when her mom traveled, how she planned to hang out "with older people," where she lived, and what she looked like. (Pros. 2 at 2-11.) Similarly, he provides no explanation as to how he was coaxed by the government into suggesting that he would provide alcohol to a 14-year-old girl "if [they] bec[a]me friends." (Pros. Ex. 2 at 5.) Based on those facts, it is unclear as to how the government's Reddit post created a "substantial risk that a law-abiding citizen would commit the offense," as would be required under Hall. 56 M.J. at 436.

In another effort to support his theory, Appellant inaccurately states that "it was law enforcement…who introduced the topic of sex." (App. Br. at 8.) To the contrary, both the documentary and testimonial evidence from SA GM show that it was Appellant who introduced the topic of sex. (*See* Pros. Ex. 1, 2, 5, 9; R. at 278-79.) After dropping several subtle clues which elicited no sexual response from "Kelly," Appellant finally said, "[Reddit] is all a bunch of people wanting to have sex," to which "Kelly" responded, "really??? My friend in Chicago met her boyfriend in it," before changing the subject. (Pros. Ex. 5 at 2-3.) After answering "Kelly's" question about his job, Appellant shifted the topic again, asking her "what would you wanna do if we hung out?" (Pros. Ex. 5 at 3.)

Appellant admits that he suggest meeting "Kelly," but claims he did not immediately create a plan to meet her. (App. Br. at 4, citing Pros. Ex. 5 at 3.) He claims that his declination to make a specific plan to meet 'Kelly,'" prompted law enforcement to "invent 'new avenues' to induce him to the criminal venture." (App. Br. at 4, 8, citing R. at 279; Pros. Ex. 5 at 279.) He asserts that "it was only based on this urging that Appellant finally agreed to meet 'Kelly.'" (Id.) Again, his statement is unsupported by the evidence. First, the portion of the record cited by

Appellant includes the testimony of SA GM who denied the "urging" implied by the Defense. He stated that by "created a new avenue," he only meant that he indicated that "Kelly's" mother would not be home during the time Appellant suggested they meet so that a plan could be set. (R. at 279.) The government's evidence shows that *Appellant* consistently asked about a plan to meet up while "Kelly" actually delayed the plan to meet up several times. (Pros. Ex. 5 at 4, 6, 16.)

For example, Appellant suggested meeting up for the first time during the Reddit messages where he stated he could visit "Kelly" in response to her messages about driving. (Pros. Ex. 2 at 5.) Appellant also asks several questions about "Kelly's" mother and her schedule, apparently gauging her level of parental supervision. (Pros. Ex. 2 at 2-11.) The first day he had an actual conversation with "Kelly," Appellant asked her to meet with him in his car during lunch. (Pros. Ex. 2 at 9-10.)

Then, once they moved to texting, Appellant brought up the topic of hanging out again, asking her, "[w]hat would you wanna do if we hung out?" (Pros. Ex. 5 at 3.) Again, he talked about "Kelly" being able to have friends over "later" and then followed up, stating, "haha maybe next week." (Pros. Ex. 5 at 6.) Later that afternoon, Appellant asked "Kelly" whether she had found any other friends "cool enough to hang out with." (Id.) I n the early morning hours the next day, 4 August, Appellant texted "Kelly," "heyyy u up?" (Id.) The next day, Appellant again texted "Kelly" in the early morning hours – this time around 0330 – "U up?" (Id. at 9.) This time, "Kelly" asked why Appellant texted her so late and he indicated he had been drinking and that he liked to "hang out at night haha." (Id. at 10.) Appellant also suggested that he wanted to meet up with "Kelly," in other more subtle ways, such as when he inquired about her level of supervision, whether she had a one- or two-story house in the context of sneaking out her

window, just to name a few. (*See, e.g.,* Pros. Ex. 5 at 17.) Moreover, Appellant told "Kelly," "I definitely want to hang out with you." (Id. at 11.)

In sum, the evidence was more than adequate to support a finding by a reasonable factfinder that the criminal design belonged to Appellant without suggestion by law enforcement. And consequently, the members' finding that the affirmative defense of entrapment did not exist was also legally sufficient.

Even assuming, *arguendo*, that the government first introduced the criminal design to Appellant, the factfinder could have still reasonably concluded that Appellant was predisposed to commit the offense prior to the interaction with "Kelly." For example, "Kelly" mentioned her age several times during her conversations with Appellant, each time Appellant seemed unfazed. (*See, e.g.,* Pros. Ex. 2 at 2; Pros. Ex. 5 at 2, 4.) Each time sex was mentioned in the conversation, it was on the part of Appellant. For instance, Appellant asked "Kelly" why she was on Reddit because it is all "just a bunch of people wanting to have sex." (Pros. Ex. 5 at 3.) Later he made a statement about people reaching out to Kelly because they wanted to "fuck [her.]" Also, he called and texted "Kelly" late at night on a couple of occasions while drinking and then explained, "[d]on't ever get too drunk because when you do start calling people because all you want to do is fuck." (Id. at 14.) It should be noted that these are just a few of numerous examples.

Appellant made a statement to "Kelly" that he's "just a dude who lives here that likes to drink and hang out. It doesn't matter with who lol" could reasonably be interpreted as him saying that age is not a factor for him. (Pros. Ex. 5 at 4.) If that were not enough, there are Appellant's voluntary statements to law enforcement wherein he candidly answered the agent's questions, informing OSI that he did in fact intend to have sex with "Kelly" despite having been

aware of her age. He essentially stated that he knew it was wrong, but he was willing to do it anyway. (See Pros. Ex. 8, 9; R. at 394.) In sum, even if there *were* some evidence to support Appellant's theory that the government enticed him to commit the crime, the panel members, having received the instruction, would still have been able to reasonably conclude based on the other evidence that Appellant had a predisposition to commit the crime and find that the defense of entrapment did not exist.

Appellant's Intent

For this argument, Appellant states that "the Government did not prove beyond a reasonable doubt that [Appellant] had the specific intent commit a sexual act on 'Kelly,' the 'certain overt act.'" (App. Br. at 10.) He also argues that he "never articulated that he wanted to have sex with 'Kelly,'" but instead, "he merely indicated a desire to hang out with 'Kelly' and 'vibe.'" (Id.)

Appellant's argument that the government's evidence did not support a finding of an overt act is without merit. The uncontroverted facts show that Appellant drove about twenty minutes from his off-base residence to Edwin Court, the street adjacent to Kelly's fictitious address, at midnight to meet "Kelly" where he was ultimately apprehended by law enforcement. (R. at 263.) After he was at the OSI/NCIS detachment, he specifically stated in his written statement "I admit my attempt to try to meet this minor while having alcohol and a condom with me…I attempted to follow through and was stopped and detained by the federal agents." (Pros. Ex. 8 at 3.) Finally, Appellant did not provide any alternative theory as to why he went to this location on that particular night, nor does he attempt to do so on appeal.

Appellant asserts that the evidence of the condom and cans of White Claw in his car when he was arrested does not prove intent to commit a sexual act upon a child.[4] (App. Br. at 10.) But that is hardly all the members had to consider.

After Appellant called Kelly late at night on two occasions, he told her that he was drunk and that he liked to hang out when he drinks. (Pros. Ex. at 10.) He also added, "[d]on't ever get too drunk because when you do start calling people because all you want to do is fuck." (Pros. Ex. 5 at 14.) Later, again when Kelly asked what appellant wanted to do if they hung out he told her to "guess." (Id. at 17.) When she asked for a clue, he then said, "the reason I call people at night." (Id. at 17-18.) And most importantly, Appellant told OSI that same night he was arrested that he would have had sex with Kelly if he had been presented the opportunity. (Pros. Ex. 9.) Finally, a condom and several cans of White Claw were found in his car after his arrest – both of which were discussed with "Kelly" and were part of the plan – and Appellant admitted that he had put the condom in the car and purchased the White Claw on his way to meet Kelly. (R. at 331, 338; Pros. Ex. 5, 8, 9.)

In conclusion, the government's evidence was more than sufficient to support a finding that Appellant did, in fact, have the specific intent to commit a sexual act on a child, beyond a reasonable doubt. Further, the government's evidence, both direct and circumstantial, was sufficient to support a finding that Appellant took a substantial step toward completion of the charged offense.

[4] As a secondary point, Appellant then asserts that the evidence concerning the condom in his car was improperly admitted. (Id.) He does not raise a separate Assignment of Error regarding this allegation.

Voluntary Abandonment

Appellant claims that he demonstrated voluntary abandonment at trial, which "is a defense to the crime of attempt." United States v. Feliciano, 76 M.J. 237, 230 (C.A.A.F. 2017) (quoting United States v. Byrd, 24 M.J. 286, 290 (C.M.A. 1987)). But when an appellant "only ceased acting . . . because of unanticipated difficulties, unexpected resistance, or circumstances which increase[d] the probability of detention or apprehension," including "fear of immediate detection or apprehension" the defense of voluntary abandonment does not exist. Id. at 240; *also see* United States v. Harjung, No. ACM 39661, 2020 CCA LEXIS 331, at *16 (A.F. Ct. Crim. App. Sep. 11, 2020).

In support of his position, Appellant states, on the night they were to meet, [Appellant] did not drive down Kisling Court despite knowing where it was and how to get there. Instead, he drove past it twice on an adjacent road, Erwin Circle." (App. Br. at 4.) But that is not what the evidence demonstrated. Instead, during trial counsel's cross-examination of Appellant, Appellant specifically clarified that he was unfamiliar with the housing side of the base, including Kisling Court, and Erwin Circle. (R. at 394.)

Appellant also asserts that, "while driving on Erwin Circle, [Appellant] did not think he could 'follow through with meeting up with [Kelly]'" because he knew it was wrong for a 23-year-old to hang out with a 14-year-old. (App. Br. at 4, citing R. at 375.) The government agrees that this is what Appellant testified to at trial. But Appellant's fatal mistake is his failure to acknowledge that the panel members were not required to accept anything Appellant said as true; they were permitted to make their own credibility determinations and draw their own inferences from the evidence received.

Appellant also makes the mistake of disregarding the other contradictory evidence before the panel, including Appellant's own prior statements. For example, Appellant previously told

investigators that he recognized the large vehicle on the street as what was or what looked like an "OSI vehicle," causing him to become "afraid and concerned." (Pros. Ex. 9.) Also on the night of his arrest, Appellant told law enforcement that after seeing the "weird SUV," he still attempted to follow through and only stopped because he was stopped and detained by federal agents. (Pros. Ex. 8, 9.)

Appellant even wavered on the facts surrounding his departure from the neighborhood during his trial testimony. At one point, he claimed that he was going to go back home because he decided not to go through with meeting "Kelly" on his own volition. (R. at 375.) But at the same time, he still acknowledged having first noticed the big SUV parked on the street, agreeing that it looked suspicious or "weird." (Id.) While there was some quibbling over whether Appellant actually knew the SUV was an "OSI vehicle," specifically, at the time he noticed it, the uncontroverted fact that Appellant saw the "weird" vehicle and then became suspicious that it might be a trap is the only pertinent detail. Appellant also acknowledged the countless opportunities he had to turn around and go back home during his 20-minute drive to the base, and again, before making a second pass down the street. (R. at 398-99.) Based on this, the members could reasonably find that the Appellant did not complete the offense due to his fear of detection rather than his own choices and conclude that the defense was not available.

In sum, the panel members had several slightly different versions of events before them. They had the testimony of the special agent who recalled that Appellant appeared to have seen the law enforcement vehicle, which caused him to attempt to leave. (R. at 263.) They also had Appellant's statements that he made to the agents right after his arrest, indicating he saw the vehicle and thought it was concerning and made him afraid. (Pros. Ex. 9.) Then they had his other written statement that he was still going to try to go through with meeting "Kelly," and

only stopped because he was arrested, suggesting that he was never trying to leave. (Pros. Ex. 8 at 3.) Finally, the members had Appellant's trial testimony where he stated that he saw the vehicle and thought it was "weird," but denied suspecting that it was OSI or that it was the reason he decided not to go through with the meeting. Taking all this evidence together, applying their common sense and knowledge of the ways of the world, and assigning the appropriate weight to Appellant's trial testimony, the members could reasonably conclude based on any of the above that the defense of voluntary abandonment did not exist.

As a whole, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). Additionally, the weight of the evidence supports the conviction beyond a reasonable doubt, and this Court should not be "clearly convinced that the finding of guilty was against the weight of the evidence" and affirm the finding of guilt. 10 U.S.C. § 866(d)(1)(B)(iii).

For the reasons outlined above, this Court should find the conviction legally and factually sufficient and deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ERR WHEN SHE ADMITTED APPELLANT'S VOLUNTARY STATEMENT TO LAW ENFORCEMENT AFTER HIS ARREST THAT HE THOUGHT HE WAS GOING TO PRISON.

Additional Facts

Appellant's "Prison Statement"

During an Article 39(a) session, the parties litigated the admissibility of evidence pursuant to Defense objections to certain contents of Appellant's recorded interview with law enforcement which the government intended to offer into evidence. The Defense specifically objected to many items under Mil. R. Evid. 404(b) which were sustained by the military judge based on her finding that government failed to provide any notice to the Defense. (R. at 69, 186-87, 198.) The military judge also overruled some of the defense's objections during these sessions, finding that the evidence at issue did not implicate Mil. R. Evid. 404(b). (Id.) One of the items discussed during these sessions was a statement appellant concerning what he thought would happen after his arrest for the charged offense. (Id.)

Concerning this evidence, the parties and military judge discussed as follows:

> STC: Ma'am, so there's a portion about -- in his interview, where he, the agent asks him, a general question, like, what do you think is going to happen? And he says "prison." []
>
> MJ: Yes. I do find that's consciousness of guilt. He knows what he did was wrong. My concern is that it might not meet 403 in that if this case goes to sentencing, the accused saying "prison" is going to be unfairly prejudicial and cause the members to believe that they must sentence him to confinement.
>
> STC: In addition, Your Honor, there's a portion about –
>
> MJ: Trial Counsel, tell me how it meets the balancing test.

STC: Well, I think you said it, Your Honor. For at least a findings case that goes to consciousness of guilt. Again, exactly like you said, Your Honor, that he knew what he did was wrong. He knew it before he did it. He knew it while he was sitting in the interview room. And so, like, if you're sitting in an interview room being interviewed by federal agents and you say you're going to prison, it means you know what you did was wrong. And so, you know, he can't get up here and say that, like, hey, like, I didn't commit a crime because he's saying he is going to prison as a result of this interview. As a result of being brought in by law enforcement agency. I mean, I do think, Your Honor, at least for sentencing purposes, and I can tell you right now, the [government]does not intend to bring this up for sentencing, the fact that he said this; therefore, you need to sentence him to this. But I do think, Your Honor, if we can get a limiting instruction at least for sentencing purposes if the members hear it, that you're not to consider that as to what is the appropriate sentence.

MJ: So, you think a limiting instruction that to the extent he said – you may simply use it as consciousness of guilt and not as an indication of what the appropriate sentence is in this case.

STC: That's correct, Your Honor.

MJ: Defense Counsel?

DC: Your Honor, as you also noted that that statement of prison is highly prejudicial especially when trial counsel said that he acknowledges – there's wording in there that he acknowledges what he did or why he's there if it was wrong – the substance of the case in and of itself acknowledges that it's wrong. That prison statement, you can get in – the government can get into that evidence much less prejudicial evidence as opposed to Airman Moreno stating that, "What do you think is next? Prison." Airman Moreno is not legally trained. He didn't understand at the time how the court-martial system works, and so in his mind, just being in that room right there, he thinks he's going to prison. That's highly prejudicial for the members to hear that, and, like Your Honor stated earlier, it puts in their mind that, if this case does go to sentencing, that he has to get there. Or, more prejudicial the fact that he stated that -- the fact that we're in findings, we then have to get to sentencing. The defense is worried that that statement will just drive the members' decision making. Well, he said prison. We only get to prison through sentencing. Therefore, we got to get -- use that statement just to get by – past findings to get to sentencing. And the defense is deeply concerned with that because it is highly prejudicial.

(R. at 186-87.)

In a later Article 39(a) session, the military judge closed the loop on the discussion about this evidence and provided her ruling as follows:

> MJ: Okay. The final question is about, "What do you think will happen next? Prison." I think it falls squarely in the consciousness of guilt evidence category. I think that the danger of unfair prejudice can be cured with a limiting instruction. As such, I will permit that statement. I will give a limiting instruction during findings and during sentencing should we get there. Counsel, do you have any questions? Does that take care of everything?
>
> DC: I believe so at this time, ma'am.

(R. at 198.)

During the Defense case-in-chief, Appellant decided to take the stand. (R. at 374.) On cross-examination by trial counsel, Appellant testified as follows:

> Q. You were then asked what you think is going to happen as a result of you being brought to OSI, correct?
>
> A. Yes, sir.
>
> Q. You responded "prison?"
>
> A. Yes, sir.
>
> Q. Probably or simply.
>
> A. Yes, sir.
>
> Q. Why did you think that?
>
> A. Uh, I had no clue how it worked afterwards.
>
> Q. But here you are sitting in an OSI, NCIS interview. In your mind, you've done nothing wrong because you never intended to have sex with Kelly, correct?
>
> A. Yes, sir.
>
> Q. And you are telling them that, basically, you wanted to have sex with Kelly?

A. I had said that sir, yes.

Q. And you said you thought you were going to prison?

A. Yes. I was —

[The Military Judge then interrupted and provided an instruction to the members.]

> MJ: And, Members, at this point, to the extent that the accused said anything about any type of sentence, in his untrained legal mind, he may have gotten during an OSI interview, you are to disregard that. With regard to whether or not we ever get to sentencing, if we should get there, we're still in the determination and findings. But you are to disregard that, as it may relate to anything involving what punishment would be appropriate.

Trial counsel then continued his questioning:

> Q. Did you say that you thought you were going to prison because you thought you were guilty?
>
> A. No, sir. I said it because I was in their office, and I didn't know what the next step was afterwards.
>
> Q. I'm sorry. What was the last part?
>
> A. I didn't know what the next step was afterwards. I was just in their office and didn't know what was happening.
>
> Q. But to go to prison you have to be convicted of a crime, correct?
>
> A. Yes, sir. But I was still in their office.

(R. at 402-03.)

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)(citing United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)). A trial judge has a "wide range of choices and will not be reversed so long as the decision remains within that range." United States v. Hippolite, 79 M.J. 161 (C.A.A.F. 2019)(quoting United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Law

Mil. R. Evid. 401 and 402 establish the broad principle that relevant evidence – evidence that makes the existence of any fact at issue more or less probable – is admissible unless another evidentiary rule, the Manual, or other governing authority provides otherwise.

Mil. R. Evid. 304(d) provides that trial counsel should disclose to defense counsel any statements by the Accused which are known to the trial counsel, relevant to the case, and which the prosecution intends to offer at trial, generally contemplating admissibility of this type of evidence.

Mil. R. Evid. 801(d)(2) expressly excludes statements made by an accused from the rule against hearsay when offered against that same accused.

Mil. R. Evid. 404(b)

Mil. R. Evid. 404(b)(1) prohibits evidence of prior crimes, wrongs, or other acts "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But the Rule permits the same evidence when it is offered "for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. at (b)(2). The Mil. R. Evid. 404(b)(2) list is non-exhaustive, and "it is unnecessary . . . that relevant evidence fit snugly into a pigeon[]hole provided by Mil. R. Evid. 404(b)." United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989).

Our superior court has "consistently held that Mil. R. Evid. 404(b) is a 'rule of inclusion.'" *See*, e.g., United States v. Tyndale, 56 M.J. 209, 212 (C.A.A.F. 2001); United States v. Young, 56 M.J. 193 (C.A.A.F. 2001). And, indeed, the Supreme Court has unanimously opined that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."[5] Huddleston v. United States, 485 U.S. 681, 687-89, 108 S. Ct. 1496 (1988) (recognizing that evidence of extrinsic acts by an accused "may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct").

When considering the admissibility of evidence of a prior act within the ambit of Mil. R. Evid. 404(b), the military judge must answer the three-pronged test set forth under United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). The Reynolds test requires: (1) evidence which would reasonably support a finding that appellant committed the specific act; (2) evidence of the act tends to make a fact of consequence more or less probable; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Id. at 109; United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010). Stated another way, "the test for admissibility of evidence of uncharged crimes is 'whether the evidence of the misconduct is offered for some purpose *other than to demonstrate the appellant's predisposition to crime*

[5] "The House made clear that the version of Rule 404(b) which became law was intended to 'place greater emphasis on admissibility than did the final Court version.' The Senate echoed this theme: 'The use of the discretionary word 'may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge.'" Huddleston, 485 U.S. at 688 (quoting H. R. Rep. No. 93-650, p. 7 (1973); S. Rep. No. 93-1277, p. 24 (1974)).

(emphasis added).'" Young, 55 M.J. at 196 (quoting United States v. Taylor, 53 M.J. 195, 1999 (C.A.A.F. 2000)).

Analysis

Appellant's statement to law enforcement that he thought "prison" would follow his arrest should not have been analyzed under Mil. R. Evid. 404(b) because it did not implicate the Rule.

Appellant now takes issue with the military judge's ruling concerning one specific item of the few the military judge did allow the government to introduce – his "prison" statement – reasoning that the statement tends to show a "consciousness of guilt." (App. Br. at 13-16; R. at 198.) He argues that the military judge failed to conduct a full analysis under United States v. Reyolds before deeming the statement admissible. 29 M.J. 105, 109 (C.M.A. 1989). The problem here is that Appellant's entire argument rests on his incorrect assertion that the "prison" statement implicated Mil. R. Evid. 404(b)(1).

The government acknowledges that the military judge might have considered this evidence under Mil. R. Evid. 404(b) based on her rationale that it was admissible to show "consciousness of guilt." (R. at 194.) But it is unclear from the record whether it was actually her intent to characterize it as Mil. R. Evid. 404(b) evidence, or if it was simply conflated with the standards for admissibility under this Rule due to the surrounding discussion. Her opinion that it shows a "consciousness of guilt" really just explained the relevance of the statement. And her conclusion concerning admissibility of much of the other evidence contained within Prosecution Exhibit 9 – that it was inadmissible due to lack of notice under Mil. R. Evid. 404(b) –suggests that the military judge in fact did not consider this statement to fall under the Rule. Regardless, the Reynolds factors simply mirror the requirements of Mil. R. Evid. 401, 403 and

the preliminary question under Mil. R. Evid. 104(b) and the military judge, unquestionably, conducted these analyses in her discussion and ruling. (R. at 186-87, 198.)

The statement at issue is not "character evidence." It was made directly to a law enforcement officer following Appellant's arrest for the misconduct underlying his conviction, following a rights advisement.[6] The mere act of uttering the word "prison" does nothing to show a particular character trait possessed by Appellant. Further, the word "prison," on its face, did not patently reference any specific uncharged "crime, wrong, or other act." Instead, would most logically be interpreted to reference the conduct for which Appellant had just been arrested, i.e., the *charged* misconduct.

In his argument, Appellant claims, "there are potentially multiple explanations as to why he said he thought he was going to prison. The context of the question and the proceeding questions are vague and ambiguous at best…and cannot reasonably establish guilt for the act itself." (App Br at 15.) Even if this argument were persuasive, this is a situation where we do not have to make any assumptions or guess what Appellant meant when he made the statement; Appellant already provided his explanation. (R. at 402-03.) During his testimony at trial, he confirmed that he was referencing the charged incident and nothing more. (Id.) He also attempted to explain that he made the statement simply because he just did not know what the next steps would be; not because he had committed some other bad act that would send him to prison. (Id.)

And looking past Mil. R. Evid. 404(b), nothing in the other Rules – Mil. R. Evid. 304(d), 401-403, 801, etcetera – should have prevented the introduction of this evidence. Instead, the

[6] Notably, trial defense counsel did not challenge the voluntariness of the statement at trial. (R. at 421-25.) Appellant also does not challenge whether the statement was made following a proper rights advisement on appeal.

Rules consistently provide exception for this type of evidence and favor admissibility. The military judge did not abuse her discretion in applying the Mil. R. Evid. 403 balancing test. The evidence was probative of the accused's consciousness of guilt, since it showed he understood that his actions were criminal. Appellant has not explained how it was *unfairly* prejudicial, especially since the military judge instructed the members that they could not consider the evidence as it related to sentencing. In sum, regardless of the specific rationale stated by the military judge, this Court can conclude that the evidence was properly admitted and affirm the lower court's ruling on the admissibility of this statement. Because Appellant cannot even demonstrate how the military judge could have properly excluded this evidence, he certainly cannot show that she abused her discretion in allowing it.

For the reasons outlined above, this Court should deny this Assignment of Error and affirm the ruling by the lower court.

III.

ANY IMPROPER DISCUSSION OF PRECLUDED EVIDENCE OR MISLEADING STATEMENTS CONCERNING THE BURDEN OF PROOF WERE CURED THROUGH SUSTAINED OBJECTIONS AND THE MILTARY JUDGE'S INSTRUCTIONS.

Additional Facts

Military Judge's Ruling Concerning Snapchat

During a hearing outside the members' presence, the following discussion occurred between the military judge and counsel for the parties:

> MJ: There is some discussion about the accused having Snapchat accounts. I haven't
> found any evidence in this case that any of the alleged criminal conduct was perpetrated through Snapchat so I'm not sure the relevance of him having two Snapchat accounts. Trial Counsel, can you tell me how that's relevant?

STC: Your Honor, I would rely on my argument yesterday in that he's – if you review
Appellate Exhibit XXVI, he talks about Snapchat accounts and how he wants them to – wants her to have a Snapchat account, and the implication is because a Snapchat account is an end-to-end encrypted item and that it automatically deletes messages. In the context of him saying that he's deleting messages and he's deleting photos, you know, honestly, the government is not trying to say like he has two Snapchat accounts, so this is shady, or whatever. But we're saying in the context of, if you look at the text messages, he's saying in the context of, like, I wish I could talk to you on Snapchat so these messages would be deleted. That's what I'm saying.

MJ: And I think to the extent that it talks about that in the text messages, I haven't heard an objection from the defense. They may have one in the future that might be relevant, but the fact that he has -- actually has two Snapchat accounts, I don't find the relevance. I think it will be unduly prejudicial for the reasons you're indicating that it seems like subversive conduct that he might have two Snapchat accounts and he explained in the video, it's to hide it from his girlfriend and I've already ruled that the information about his girlfriend does not meet the balancing test. I'm not ruling that in the text messages where he asks her if she has a Snapchat account so that messages can be deleted, I'm making no ruling on that at this time. There is no objection before the court, and I think that that might be relevant.

STC: Understood, Your Honor. I just -- he references Snap in the text messages, right. But then he confirms on the video that he actually has Snapchat is what I'm saying. That he physically owns it. I guess he -- in the text messages, it is not clear. He's like, I wish I had Snap, or, I wish you had Snap or something like that. In the video he confirms that he actually has it, and so that goes to his intention of what he's talking about in the context of the text messages that he wants her to delete it, he's going to delete it, etc. Again, I'm not going to like, the government is not going to talk about the fact that he has two different Snapchat accounts, etc. I just want in his words that he confirms that he has a Snapchat account.

MJ: So, there's a point in the video where he gives his Snapchat handles. Is that
sufficient?

STC: That's fine. Yeah, that's fine.

> DC: Your Honor, the defense would object to that as well considering there is no evidence offered that Airman Moreno communicated with the stated 14-year-old over Snapchat.
>
> STC: Your Honor, that's not the point that we're getting at. It's because the 14-year-old - the agent, is telling him that she does not have a Snapchat account and the context of it is, like, he's saying "I wish you had Snap" in the context of talking about deleting messages, right?
>
> MJ: So, why does him having a Snapchat account matter? Like, he – she doesn't have one. It's – why would he ask her if she had a Snapchat account if he didn't have one. I mean, I also don't know how it's relevant. They never communicated through Snapchat. He asks her if she has one. I think he gives her the reason he wants her to use Snapchat in the messages. Am I correct?
>
> STC: It's not direct, no, ma'am.
>
> MJ: I thought it was pretty direct, but I could be wrong. I think it's unduly prejudicial to the members to hear that he has two Snapchat accounts.

(R. at 186-87).

Findings Argument

Discussion of Snapchat

Trial counsel's only discussing of Snapchat during his closing argument was as follows:

> The text messages. He wanted to send – she asked him, "If you got another pic?" "I forgot what you looked like." "I'll send it on Reddit so I can respond and delete it." He asked her, "You should really just make a Secret Snap." "Ha, Ha." "I know." "If you did that it would be a lot easier to talk." Let's talk about that for a second. Why would he want to delete pictures? Why would he not send it through text? So, he could delete it. It's because he knows that the cell phone companies keep a record of that data. And on Reddit, you can delete it. And that is the reason why the agent, and you will see, I think it was Prosecution Exhibit 3, a screenshot of him sending a message of himself. That is the reason that the agent took that screenshot, is so he would be able to keep that record before the accused deleted it.

(R. at 452.) During this portion of trial counsel's argument, trial defense counsel did not object. (Id.)

Regarding his personal experience with the app, trial counsel stated:

> STC: About the Snapchat account, now, I don't have Snapchat, but for my job you encounter a lot of young airmen, and young airmen–
>
> SDC: Objection. Facts not in evidence.
>
> MJ: I'm going to sustain that.
>
> STC: Okay.

(Id.)

Improper Burden Shifting

Specifically, trial counsel stated during his findings argument:

> STC: Now he admitted to a lot of facts of evidence that [SA GM] obtained, that the government has, that he can't disprove.
>
> SDC: Objection, Your Honor, to the last comment, as burden shifting. The phrase, "that he can't disprove," was just used.
>
> STC: Yeah, Your Honor, I didn't mean it in that context.
>
> MJ: Sustained.
>
> STC: Yes, ma'am. Okay.
> MJ: You will disregard that statement. As I have instructed you, the burden never shifts to the accused.

(R. at 461.) Then, almost immediately after the military judge gave the curative instruction, trial counsel stated:

> Members, again, for this case I'm going to ask you, again, to use your common sense, your ways of the world, from what makes sense and what doesn't. And I want you to hold us to our burden of beyond a reasonable doubt, because that is what the military judge instructed you to [do], that is what our system instructs you to [do], that's what we as the government want you to hold us to. And at the

> end of this case, we're asking you to find the accused guilty of the Charge and its Specification. Thank you.

(Id.)

Standard of Review

Allegations of prosecutorial misconduct and improper argument de novo. United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). If proper objection is made, appellate courts review for prejudicial error. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing 10 U.S.C. § 859 (2000)).

Similarly, the adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). However, where an appellant does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, appellant waives all objections to the instructions. In United States v. Davis, 79 M.J. 329, 331-32 (C.A.A.F. 2020).

CAAF recently held, in United States v. Cunningham, that where the trial defense counsel answered "no" when the military judge asked if either party had any objections at the conclusion of argument, the response constituted an express waiver as the response "did not just fail to object," but "affirmatively declined to object." 83 M.J 367, 374 (C.A.A.F. 2023). Similarly, in United States v. Kitchen, this Court declined to pierce the waiver where the military judge involved counsel in drafting and tailoring instructions, the military judge solicited objections to and requests for additional instructions, defense counsel did not offer additional instructions, and, when asked by the military judge, counsel did not object to the final instructions provided to the members ACM 40155, 2023 CCA LEXIS 58 (A.F. Ct. Crim. App. 3 February 2023) (relying on Davis, 79 M.J. 329.).

If this Court determines Appellant did not waive the issue concerning the adequacy of the curative instruction, it should be reviewed for plain error. In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* Fletcher, 62 M.J. at 184). For prejudice, the test is whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Law

Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon. United States v. Meek, 44 M.J. 1, 3 (C.A.A.F. 1996) (citing Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)). The characterization of certain action as "prosecutorial misconduct," however, does not in itself mandate any particular relief to an appellant. Id. (citing Greer v. Miller, 483 U.S. 756, 765, 97 L. Ed. 2d 618, 107 S. Ct. 3102 (1987); Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974)). Instead, an appellate court usually considers the legal norm violated by the prosecutor and determines if its violation actually impacted on a substantial right of an accused (i.e., resulted in prejudice). Id. (citations omitted). If it did, then the reviewing court still considers the trial record as a whole to determine whether such a right's violation was harmless under all the facts of a particular case. Id.

Trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied,* 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (quoting Dunlop v. United States, 165 U.S. 486, 498 (1897)).

"Appellate judges must exercise care in determining whether a trial counsel's statement is improper or has improper connotations." United States v. Cueto, 82 M.J. 323, 326 (C.A.A.F. 2022). The Supreme Court has emphasized that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Id. (citing Donnelly v. DeChristoforo, 416 U.S. at 647.) A statement that might appear improper if viewed in isolation may not be improper when viewed in context. Id. And

even if a statement is improper, it may not be sufficiently prejudicial, in the context of the entire trial, to violate the accused's due process rights. Id. at 642-43.

Even where the appellant has demonstrated misconduct by trial counsel, CAAF has opined in several instances that no prejudice existed where the military judge took "prompt remedial action" at trial. *See, e.g.,* Cueto, 82 M.J. 323 (holding "the prosecutorial misconduct claims failed as the statements at issue, even if improper, any error was harmless the members were given complete and correct instructions and informed that those instructions controlled"); *see also* Meek, 44 M.J. 1; United States v. Rushatz, 31 M.J. 450 (C.M.A. 1990).

Analysis

Appellant declares that the trial counsel "committed prosecutorial misconduct" when he: (1) discussed Snapchat during his cross-examination of Appellant and again in closing argument notwithstanding the military judge's ruling to exclude the evidence; (2) inserted personal experiences with Snapchat; and (3) engaged in improper burden shifting. (App. Br. at 17-20.)

While its questionable whether trial counsel's arguments were, in fact, improper, discussed below, Appellant unduly minimizes the significance of the military judge's actions to remedy the issues he raises. He also disregards trial counsel's acknowledgment of his mistake, as well as trial counsel's apology and clarification.

Snapchat Ruling

The error alleged was forfeited at trial. Trial defense counsel did not object when trial counsel asked Appellant about his statements about Snapchat on cross-examination. (R. at 388.) Also, Prosecution Exhibits 2 and 5, presumably reviewed by the Defense following the military judge's ruling, contained material about Snapchat and were admitted without objection. (R. at 234, 241.) Further, trial defense counsel did not object during trial counsel's findings argument

when he discussed Appellant's statements about Snapchat. (R. at 452.) It was only when trial counsel began to speak about his personal knowledge of the application that trial defense counsel objected. (Id.) Even then, trial defense counsel did not object on the basis of a prior evidentiary ruling; he cited "facts not in evidence" as his grounds for objecting. (Id.) As such, Appellant, through his counsel, has forfeited appellate consideration on this point.[7]

Even if this Court disagrees, it should still find that that trial counsel's discussion of Snapchat was not outside the military judge's ruling and, therefore, was not improper. Here, it seems that Appellant may have simply misunderstood the ruling concerning this evidence. The military judge never precluded any and all discussion of Snapchat. Instead, her ruling was that evidence of whether Appellant has two different accounts was not relevant to the issues. (R. at 187 ("I think it's unduly prejudicial to the members to hear *that he has two Snapchat accounts* (emphasis added)".)

Indeed, she referenced the text messages where Appellant suggested Snapchat to "Kelly," to explain to trial counsel that the availability of this other evidence and the surrounding context was all he needed to make the point he wanted to argue to the members; that Appellant suggested that he and "Kelly" should use Snapchat to talk and send photos because he knew what he was doing was wrong and he did not want to get caught. (Id.) For these reasons, this Court should conclude that trial counsel's argument about Snapchat was not outside the military judge's ruling and, therefore, was not improper.

---

[7] The government acknowledges that allegations of prosecutorial misconduct are typically reviewed for plain error in the absence of an objection at trial. United States v. Andrews, 77 M.J. 393, 401-02 (C.A.A.F. 2018). However, the premise that trial counsel's findings argument was improper hinges on this Court's interpretation of the military judge's ruling concerning the Snapchat evidence. In other words, if the military judge did not actually preclude introduction of this evidence as Appellant now claims, trial counsel's argument in and of itself could not demonstrate "prosecutorial misconduct" sufficient to trigger plain error review.

Injection of Personal Experience with Snapchat

Also concerning Snapchat, Appellant claims that the trial counsel made improper references to his personal knowledge about the app and its uses based on his professional experience. (App. Br. at 19.)

Trial counsel's brief discussion of his outside knowledge about Snapchat – a mere thought that was never finished – was likely inadvertent. Moreover, it is unclear exactly what trial counsel was even going to say, since his words immediately drew an objection from trial defense counsel, which the military judge sustained before trial counsel could complete the sentence. Any suggestion that these few words could have possibly influenced the members to convict Appellant simply because they believed he had Snapchat account and Snapchat is bad would be unreasonable. Thus, this incomplete comment, even if improper, prejudiced Appellant very little, if at all. The minor mistake was completely inconsequential to the outcome of the case.

Improper Burden Shifting

Appellant states that the trial counsel improperly argued during closing argument that, because Appellant could not "disprove certain facts from the law enforcement agent, he was unreliable and guilty," which amounted to improper burden shifting. (App. Br. at 17, citing to R. at 461.) Here, Appellant has selected a mere snippet from the trial counsel's closing argument, without context. This is a classic example of the "surgical carving" tactic discussed and criticized in Baer. 53 M.J. at 238.

During closing argument, trial counsel was merely highlighting some of Appellant's testimony which was contradicted by other evidence, including his prior statements to law enforcement and SA GM's testimony. (R. at 459-61.) Trial counsel's actions in arguing why the

members should not find Appellant's testimony credible or reliable is precisely what trial counsel is expected to do as a zealous advocate for the government. *See* McPhaul, 22 M.J. 808. During this same portion of his argument, the trial counsel was seemingly about to point out the areas that were not contested by Appellant, before drawing an objection from trial defense counsel. (R. at 461.)

Here, as in Cueto, the statement at issue was immediately remedied by the military judge when she sustained trial defense counsel's objection, provided the members the correct instructions and informed them that those instructions controlled. 82 M.J. 323. Thus, Appellant's claims should fail, as the error resulting from the statements, even if improper, was harmless.

Finally, Appellant alleges that the instruction the military judge provided on improper burden shifting was insufficient to remedy the issue, because it was "weak." (App. Br. at 19.) This issue, even if it held any merit, was affirmatively waived by Appellant at trial Appellant does not state what type of instruction he would have preferred here or would have considered appropriate. And it is so unclear largely because Appellant never requested any specific curative instruction following the alleged error at any point prior to sending the members into deliberations. (R. at 461-476.) Here, as in Cunningham, Appellant "affirmatively declined to object." 83 M.J at 374; a*lso see* Davis, 79 M.J. 329; Kitchens. When asked by the military judge whether counsel had any objections to her instructions or additions thereto, both government trial counsel and trial defense counsel specifically stated, "no, your honor." (R. at 476.) Thus, this Court should deny Appellant's claim that the military judge's instructions were insufficient.

For the reasons stated above, this Court should deny this assignment of error.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 February 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST) TO FILE A REPLY – OUT OF TIME**
v.	)	Before Panel No. 1
Senior Airman (SrA) **CASSIUS A. MORENO,** United States Air Force, *Appellant*.	)	No. ACM 40511 13 February 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file a Reply Brief to the Government's Answer, out of time. Appellant requests an enlargement for a period of two (3) days, which will end on **15 February 2025**. The record of trial was docketed with this Court on 30 August 2023. From the date of docketing to the present date, 533 days have elapsed. On the date requested, 535 days will have elapsed.

On 19 April and 8-11 May 2023, Appellant was tried by a general court-martial, consisting of officer members, at Joint Base San Antonio – Fort Sam Houston, Texas. R. at 1, 71, 530. Contrary to his pleas, Appellant was found guilty of committing a sexual act upon a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ). R. at 490. On 11 May 2023, the panel of officer members sentenced Appellant to a dishonorable discharge, three months of confinement, total forfeitures, and a reduction to the pay grade of E-1. R. at 530. The convening authority took no action on the findings or adjudged sentence. Convening Authority Decision on Action – *United States v. SrA Cassius A. Moreno*. Appellant is not currently confined. The ROT

is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits. The transcript is 531 pages.

Undersigned counsel is currently assigned 29 cases; 16 cases are pending initial Assignments of Error before this Court. No case before any court has priority over this case for either undersigned or civilian co-counsel. Undersigned counsel drafted part of the reply brief over the weekend, and sent a copy of that draft to civilian co-counsel for review. However, civilian co-counsel has been unable to review that draft or complete the remainder of the reply brief for filing.

There is good cause to grant this enlargement of time, out of time. Recently, civilian co-counsel's law firm has lost several administrative assistants. One of those assistants resigned after failing to calendar numerous cases on attorneys' schedules. Since losing those assistants, civilian co-counsel has worked diligently to both cover the workload of those assistants, as well as interview, hire, and train new assistants. In addition, in the last several days, civilian co-counsel had three unforeseen, short deadlines for officer clients facing severe administrative action. Because of these circumstances, civilian co-counsel was unable to complete a review of the drafted material, complete a draft of the reply brief, or file a motion for an enlargement of time.

Counsel have not contacted Appellant to provide him an update on the status of counsel's progress on this case. Appellant initially consented to all requests of enlargements of time necessary for the detailed military defense counsel and civilian co-counsel to provide adequate and effective attention to his case. Appellant was advised of his right to a timely appeal. Appellant has previously provided limited consent to disclose a confidential communication with counsel wherein he consented to requests for enlargement of time. Through no fault of Appellant, civilian co-counsel have been unable to complete a draft of the reply brief. An enlargement of time is necessary to allow counsel to fully complete a draft and file it with this Court.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time, out of time, for good cause shown.[1]

Respectfully submitted,

[redacted]

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[1] Because a reply brief is not presently ready to file, Appellant did not believe a motion for leave to file the reply brief out of time was appropriate. However, should this Court disagree, Appellant requests this Court treat this motion as a motion for leave to file the reply brief, out of time.

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 13 February 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Senior Airman (E-4) **CASSIUS A. MORENO,** United States Air Force, *Appellant*.	)	No. ACM 40511
	)	18 February 2025

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

I. SrA Moreno's conviction is legally and factually insufficient.

A. SrA Moreno—a person who did not have the predisposition to commit the charged conduct—was entrapped by law enforcement.

The Government induced SrA Moreno to commit the charged conduct by creating "a substantial risk that a[] . . . law abiding citizen would commit the offense. *United States v. Lozicki*, No. ACM 39643, 2020 CCA LEXIS 469, at *25 (A.F. Ct. Crim. App. Dec. 28, 2020) (quoting *United States v. Howell*, 36 M.J. 354, 358 (C.M.A. 1993)). Entrapment means that law enforcement cannot "actually implant[] the criminal design in the mind of the defendant." *United States v. Kitchen*, No. ACM 40155, 2023 CCA LEXIS 58, at *17 (A.F. Ct. Crim. App. Feb. 3, 2023) (citing *Jacobson v. United States*, 503 U.S. 540, 548 (1922); *United States v. Russell*, 411 U.S. 423, 435-36 (1973); *Howell*, 36 M.J. at 358).

Law enforcement posted a message on a social media page titled "18 Not Safe for Work." R. at 273. According to the agent that made the post, "Not safe for work" is an online phrase that means "sexual" or "adult content." R. at 273-74. Despite this, law enforcement made a post on that page posing as a 14-year-old-girl looking for sex. R. at 233. In doing so, law enforcement implanted the criminal design on readers—such as SrA Moreno—to engage in a sexually charged

conversation with a 14-year-old girl. The Government fails to address this point. Instead, the Government places the onus on SrA Moreno, arguing he should not have visited a "18 Not Safe for Work" webpage. Ans. at 9. Here, the Government demonstrates its ignorance—there is nothing illegal about visiting websites that have "sexual . . . *adult* content." And, visiting such a webpage does not demonstrate, by any standard of proof, that SrA Moreno had the predisposition to have sex with a *minor*.

Making matters worse, it was law enforcement who first introduced the topic of sex. Pros. Ex. 5 at 2. In fact, SrA Moreno did not send a single sexually explicit message or photo to the agent, despite repeated goading from law enforcement to do so. Pros. Ex. 2; Pros. Ex. 5. The Government disagrees, arguing that "[e]ach time sex was mentioned . . . it was on the part of [SrA Moreno]." Ans. at 12. But this ignores the context of the conversations. This Court should review Pros. Exs. 2 and 5 in their entirety; a review of those exhibits will demonstrate that the criminal design clearly originated with law enforcement.

The Government also points to legal behavior in an attempt to bolster the record in its favor. Ans. at 10-11 (discussing SrA Moreno's benign text messages and his offers to hang out with "Kelly" on his lunch break in a public place in the middle of the day). While text messaging, or offering to hang out in broad daylight in a public place, with a 14-year-old girl is admittedly strange, it is not illegal. Even if it were illegal—such as agreeing to purchase alcohol for a minor—such evidence is a far cry of proof beyond a reasonable doubt that SrA Moreno had the *criminal design to have sex* with a minor.

The Government had to prove, beyond a reasonable doubt, that the criminal design originated with SrA Moreno. The evidence in this case fails to establish this. Therefore, SrA Moreno's conviction is legally and factually insufficient.

B. SrA Moreno lacked the specific intent to commit the offense.

SrA Moreno maintains the Government failed to prove he had the specific intent to have sex with a minor. After all, the Government admitted no evidence that SrA Moreno was meeting with "Kelly" to have sex, despite law enforcement agents' repeated attempts to get him to admit to such a plan.

The Government relies on the fact that SrA Moreno drove to meet with "Kelly" at night. Ans. at 13. However, the Government failed to present any evidence that SrA Moreno went to the meet-up location. Ans. at 13-17. It seems, according to the Government, that it is sufficient that SrA Moreno went *near* the location of the meet-up. Ans. at 13. This, certainly, is insufficient evidence to find, beyond a reasonable doubt, that SrA Moreno had the specific intent to have sex with "Kelly." While the Government ultimately relies on SrA Moreno's "admission," Ans. at 13 (citing Pros. Ex. 8 at 3), he did not admit to intending to have sex with "Kelly."

Because SrA Moreno did not have the specific intent to have sex with "Kelly," his conviction is legally and factually insufficient.

C. Assuming SrA Moreno had the specific intent, he nevertheless abandoned any plan to commit the charged offense.

SrA Moreno voluntarily abandoned any plan he may have had. Despite knowing the specific location to meet "Kelly"—Kisling Court—SrA Moreno never arrived at that location. R. at 287, 289, 376. Instead, he drove on an adjacent road—Erwin Circle—going past Kisling Court twice. R. at 289, 376. SrA Moreno testified that he knew where Kisling Court was and made a conscious choice not to drive down it. R. at 373-76. After realizing meeting with a 14-year-old girl was wrong, he decided to leave and go home. He was apprehended before ever turning on Kisling Court. R. at 375-76. Moreover, SrA Moreno's abandonment was not based on circumstances that increased the probability of his detention or apprehension; he did not know

"Kelly" was an NCIS agent, nor did he believe law enforcement was at Kisling Court. R. at 374. The Government obfuscates, arguing that the members need not have believed SrA Moreno when he testified at trial. Ans. at 15. Even if this were true, it ignores the fact that there was *no contrary evidence* for the members to conclude otherwise; the only evidence the members had showed abandonment. The Government argues that SrA Moreno's testimony was not reliable. For this proposition, the Government notes that SrA Moreno testified that the black SUV (ostensibly a law enforcement vehicle) looked weird. R. at 375. But, as the Government concedes, SrA Moreno did not think it was "weird" because it was a law enforcement vehicle, he merely thought it was strangely parked on the street.

Despite citing several abandonment cases in the opening brief, the Government failed to analyze any caselaw in making its argument. Instead, the Government relies on a hypothetical argument that the members must have discounted all evidence of abandonment. Ans. at 15-16. As noted above, the problem with this argument is that the members had no contrary evidence to rely on in the Government's favor. Instead, the members were left with facts showing SrA Moreno never drove to the meet-up location despite knowing where it was and was arrested while he was driving away from Kisling Court.

The evidence in this case is a far cry of any crime. If law enforcement agents had been patient, it is possible the sting operation would have worked at some later date. But they were not; they jumped the gun and initiated an arrest despite knowing that SrA Moreno had not arrived at the meet-up point. This, combined with SrA Moreno's testimony that he realized what he was doing was wrong and was leaving, is clear and uncontroverted evidence of abandonment. Therefore, the conviction is legally and factually insufficient.

II. The military judge erred when she admitted Senior Airman Moreno's response that he thought he was going to prison after being apprehended.

The Government acknowledges the military judge's analysis of how she ultimately admitted the statement is confusing, at best, and SrA Moreno concurs. Ans. At 24. The Government further argues that SrA Moreno's statement should not be evaluated under Mil. R. Evid. 404(b), asserting that it is not character evidence, but made directly to a law enforcement officer following his apprehension. Ans. At 24-25. However, in a similar post arrest scenario, in *United States v. Arevalo*, 43 M.J. 719 (A.F. Ct. Crim. App. 1995), this Court had the opportunity to discuss the admissibility of the accused's statements made to law enforcement upon his apprehension in which he offered to "do anything if the charges were dropped." *Id*. at 720. This Court applied the *Reynolds* test in evaluating the admissibility of the statements, reasoning that the statements were either admissible as part of a series of events or to show consciousness of guilt. *Id*. at 721.

Merely asserting that the statements were made to a law enforcement officer has no bearing on whether the statements constitute character evidence. Moreover, consciousness of guilt statements are routinely analyzed under Mil. R. Evid. 404(b). *See generally United States v. Borland*, 12 M.J. 855 (A.F.C.M.R. 1981); *United States v. Blaney*, 50 M.J. 533 (A.F. Ct. Crim. App. 1999).

Recognizing the analysis one must conduct under *Reynolds*, under prong one, the confusing nature of the question underscores the fact SrA Moreno's answer cannot be read to show the evidence supports a finding the accused committed the crime. As argued in SrA Moreno's initial brief, if SrA Moreno's answer could be applied to multiple situations, the ambiguity undercuts the value.

Prongs two and three under *Reynolds* are the traditional Mil. R. Evid. 401 and 403 analyses that the Government glosses over in its Answer, saying merely that "it showed he understood his actions were criminal" and that SrA Moreno did not demonstrate unfair prejudice. Ans. at 26. Interestingly however, the Government cites to a portion of the transcript that shows just how non-probative and confusing the discourse between SrA Moreno and the law enforcement agent was. Ans. at 21. On cross examination of SrA Moreno, the Trial Counsel asks why he thought he was going to prison and in response, SrA Moreno says he thought he was going to prison because he was in a law enforcement officer's office and he did not know what the next steps were. (R. at 402-03). In essence, he made an assumption about how the criminal justice system works. The next question from Trial Counsel is particularly illustrative of the confusing nature of the word "prison" because he asks:

Q. But to go to prison you have to be convicted of a crime, correct?

A. Yes, sir. But I was still in their office.

The Trial Counsel was clearly wrong. A service member or civilian can go to jail based simply on the nature of the crime for which they stand accused, risk of flight or the potential risk they pose to society. While defense counsel did not object to the question as legally incorrect and misleading, he should have because it would have demonstrated exactly what is being argued on appeal: that Appellant's reasoning for thinking he was going to jail next was likely based on factors that had nothing to do with whether he believed he was guilty. Trial Counsel's patently disingenuous and legally flawed question clearly prejudiced SrA Moreno and highlights the danger posed with the question defense counsel sought to avoid.

Even if this Court were to find that *Reynolds* does not apply in the analyses, the preceding arguments under Mil. R. Evid. 401 and 403 amply demonstrate that under either one of those rules the evidence was not probative and blatantly misleading.

III. The Government committed prosecutorial misconduct by improperly shifting the burden and repeatedly referencing inadmissible evidence.

A. Snapchat

The military judge ruled that the only relevant or permissible uses of the discussion of Snapchat could come from the video in which the SrA Moreno discusses his Snapchat handle and she asks the Government whether that would suffice and they agreed it would. R. at 187. The military judge is also clear in her rulings that Snapchat is not relevant because none of the conversations occurred over Snapchat. R. at 187. Moreover, her ruling on the record reaffirmed this position. R. at 388 ("I don't think Snapchat was used in this case, correct?").

The Government tried to parse out the errors regarding Snapchat to minimize their impact, but one cannot evaluate the consistent references to Snapchat individually, they must be viewed holistically. Moreover, the analysis outlined in *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005), under the fifth prong presupposes that prosecutors are to follow the rulings of the military judge. The Government counsel here repeatedly did not.

The Government seeks to argue waiver of this issue because defense counsel failed to object to the admission of certain evidence that referenced Snapchat or that SrA Moreno discussed Snapchat in his text messages. That argument conflates the issues because such references were permissible. Trial Counsel, however, continually sought to push the boundaries into impermissible areas and even inserted his own opinion on the subject—an approach that is objectionable regardless of the subject matter.

B. Improper Burden Shifting

The plain language of the transcript shows the Trial Counsel stated SrA Moreno, by virtue of taking the stand, could not disprove certain facts. R. at 461. It is of no moment that Trial Counsel was not able to list or provide context to what he thought SrA Moreno could not disprove. SrA Moreno did not have to disprove anything and the prosecutor in this case was a Senior Trial Counsel who by virtue of his position should know that word choice matters. Arguing that SrA Moreno was not credible because of various pieces of evidence contradict him is permissible; telling the panel SrA Moreno had an obligation to disprove the Government's case is not and exceeds the bounds of zealous advocacy.

Similarly, and while not in the category of burden shifting, but well within the category of improper trial tactics, is putting legally incorrect questions to a witness, which is what Trial Counsel did and was discussed in Assignment of Error II. Specifically, when Trial Counsel told SrA Moreno that one only goes to jail when convicted of a crime, he knew or should have known that to be false. This fact merely adds to the analysis under *Fletcher* prongs one and two: "(1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole." *Fletcher*, 62 M.J. at 184. It is yet another example of misconduct interspersed throughout a very short trial.

For the reasons stated above, this Court should set aside the finding and sentence because the Trial Counsel engaged in Prosecutorial Misconduct to such an extent that it impacted SrA Moreon's right to be presumed innocent and to a fair trial.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 February 2025.

Respectfully submitted,

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